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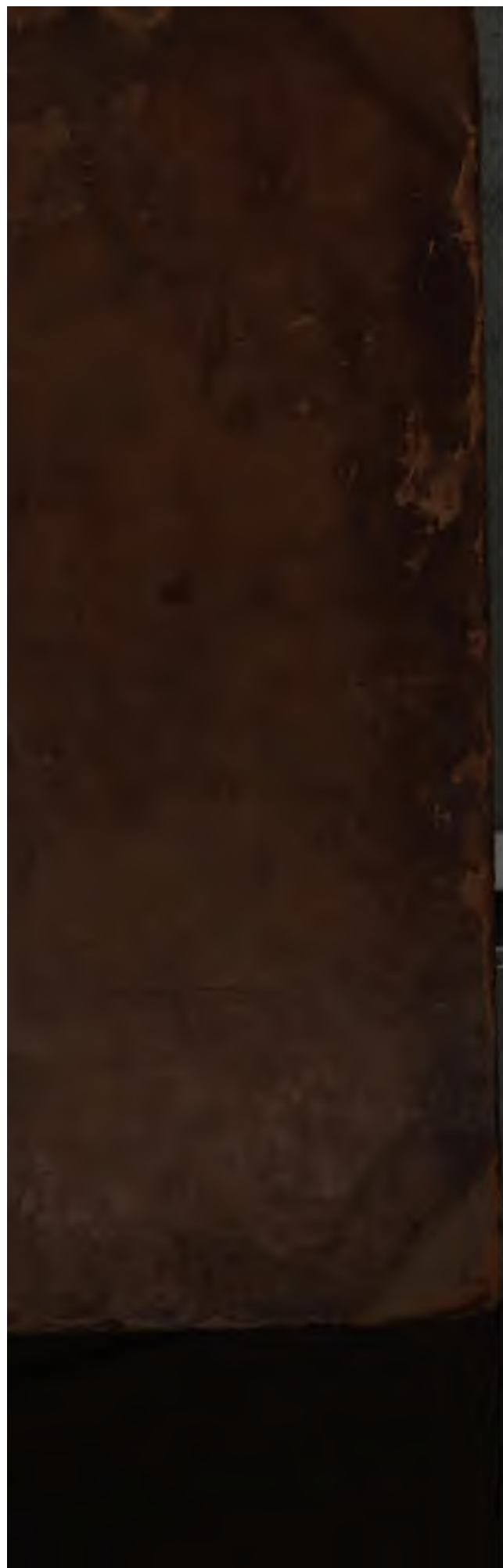
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R E P O R T S

OF

ADJUDGED CASES

IN THE

Court of Common Pleas

DURING THE TIME

LORD CHIEF JUSTICE WILLES

PRESIDED IN THAT COURT;

TOGETHER WITH SOME FEW CASES OF THE SAME PERIOD DETERMINED

IN THE

HOUSE OF LORDS, COURT OF CHANCERY, AND EXCHEQUER CHAMBER.

Taken from the Manuscripts of Lord Chief Justice Willes.

· WITH NOTES AND REFERENCES

TO PRIOR AND SUBSEQUENT DECISIONS,

By CHARLES DURNFORD,

OF THE MIDDLE-TEMPLE, BARRISTER AT LAW.

Dublin.

PRINTED BY JOHN EYSHAW, 98, GRAFTON-STREET.

1800.



TO
THE RIGHT HONOURABLE
LLOYD LORD KENYON,
BARON OF GREDINGTON
IN THE COUNTY OF FLINT,
LORD CHIEF JUSTICE OF ENGLAND,

THIS WORK

IS,

WITH HIS LORDSHIP'S PERMISSION,

MOST GRATEFULLY .

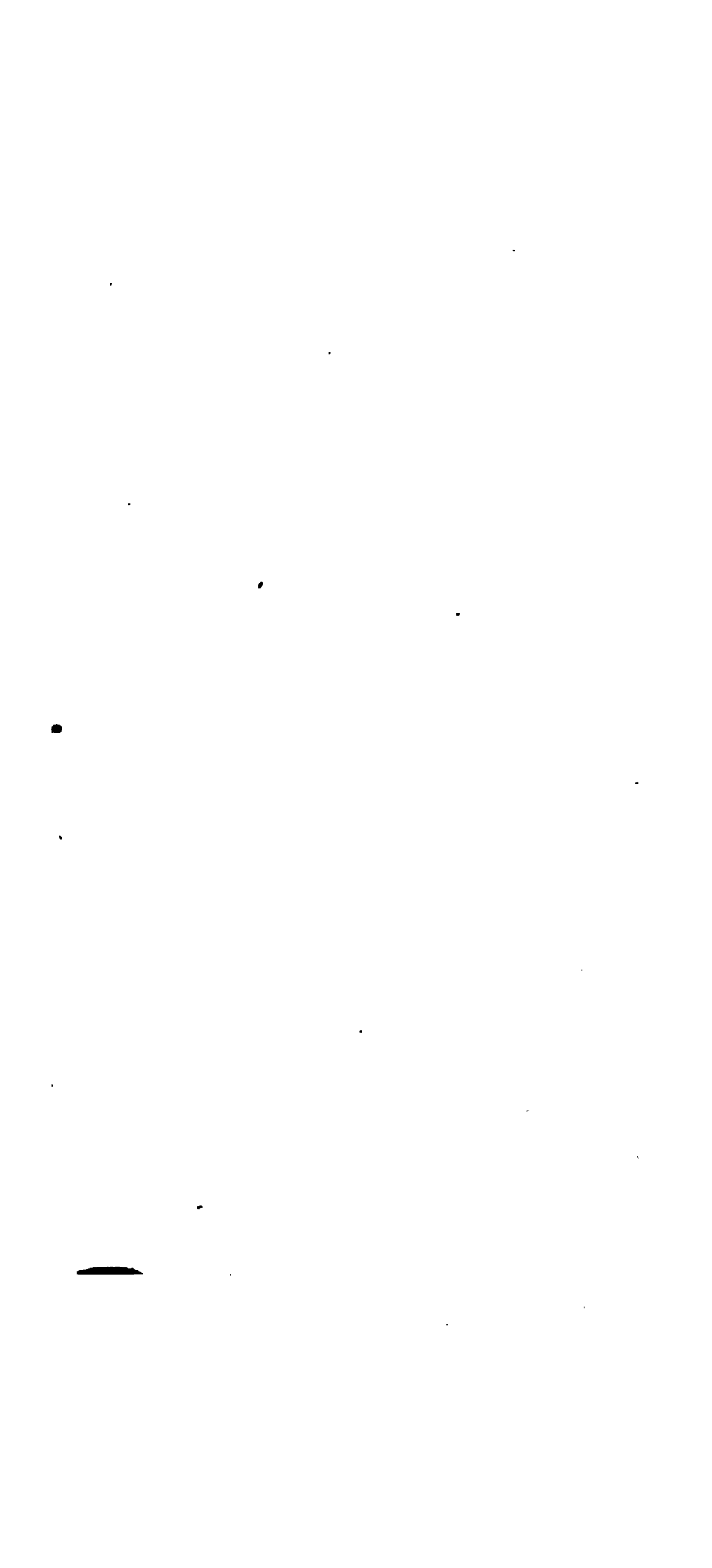
AND

RESPECTFULLY DEDICATED

BY HIS LORDSHIP'S MOST OBLIGED

AND OBEDIENT HUMBLE SERVANT

CHARLES DURNFORD.



P R E F A C E.

AS the profession may expect some account of the authenticity of the manuscripts from which this work is taken, I think it necessary to say that they are unquestionably the hand-writing of Lord Chief Justice *Willes* himself, that they were bequeathed by him to his son the late Mr. Justice *Willes*, and by him to his son the late Mr. *Edward Willes*, from whom they came into the possession of his two surviving brothers, who have entrusted them to me for publication.

Though I am aware that indiscretion has been justly imputed to some publishers of Reports from the manuscript notes of their ancestors, which they had taken for private use only, and in some instances at early periods of their professional lives, it appears to me that the present publication will neither commit the reputation of the learned Judge whose name is prefixed to it, or be liable to the objection that is sometimes deservedly raised against the publication of posthumous works.

Having attentively studied the writings and decisions of this great Judge, I think that the publication of these determinations will occasion his name as a Lawyer to be held in as high estimation in succeeding ages as it was in the time when he lived.

The present work differs from the generality of posthumous works in this respect, that the different parts of it were not only written by the Chief Justice for the purpose of making them public, but for the most part they were actually published to the profession by himself.

That the Lord Chief Justice intended them for publication in this mode is apparent from the very careful and regular manner in which, to a certain period, he copied out his own judgments in separate note books after he had written them on the paper books belonging to the particular cases : And declarations of such an intention were made

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1st, Those which are taken verbatim from the Lord Chief Justice's manuscripts; and they are either the judgments of the court which he publicly delivered, containing as well his own abridgment of the record or special case as the reasons on which the opinion of the court was founded, or cases of which he wrote an account in his own note books after the cases had been determined.

2dly, The judgments of the court which he gave, without his own abridgment of the records; the records in which cases I have abstracted either from the original records or from the paper-books.

3dly, Cases taken from short notes of the Lord Chief Justice's manuscripts, the records being abridged by myself.

4thly, Those where nothing more appeared on the Lord Chief Justice's paper books than simply, "judgment for the plaintiff" or "for the defendant," &c. the records of which cases I have abridged, and the opinions of the court I have taken from other quarters and added in the notes.

Throughout the whole it may be observed that the language of the Lord Chief Justice is printed between inverted commas.

The notes to this Work, (except where they consist of references to cases already in print and to some very modern decisions) may also be arranged in four classes:

1st, Those of the Lord Chief Justice, distinguished by "MS. Lord Chief Justice *Willes*."

2dly, Manuscript cases collected from various quarters, in the possession of the Lord Chief Justice, to many of which he referred himself; and they are distinguished thus "MS. Coll. Lord Chief Justice *Willes*."

3dly, Manuscript notes of Mr. *Baron* (afterwards Mr. Justice) *Wm. Fortescue*, in his own hand writing; thus marked "MS. Mr. Justice *Wm. Fortescue*."

4thly, Notes taken by the late Mr. Justice *Abney*, afterwards copied by his clerk; thus distinguished "MS. *Abney, J.*"

In presenting this work to the public, my chief apprehension is, that the notes may in some instances be deemed to be either too long or ill arranged, though my object

object has been to compress them : but those only, who have undertaken a work of this kind, know the difficulty attending it. And I cannot but be conscious that whatever merit there may be in this work, it is the merit of the Lord Chief Justice ; whatever demerit, it belongs to myself. Owing partly to the necessity of decyphering and transcribing myself the manuscripts of the learned Chief Justice which are in a character peculiar to himself, it has been however my occupation as well as my amusement during the vacations of several years past ; and with all its imperfections I now commit it to the examination of a liberal Profession.

November 6th, 1799.

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C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

Et c. Et c. Et c.

BRICE *against* SMITH:

[M. 8 Geo. II. Roll. 1283]

1737.

Friday,
May 20th.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "In formedon. This cause was spoken to the last term (a).

Under a devise to A. and his heirs for ever, and if he die without issue then to his right heirs, A. takes an estate-tail. The plaintiff in formedon claimed under a devise, to which was annexed

The action was brought by *Philip Brice* against *Gerard Smith* for four messuages and one acre of land in *Ola Brentford*. The cause was tried before Lord Ch. Just. EYRE 17th February, 8 Geo. 2.; and a verdict was given for the plaintiff, but a case was reserved for the opinion of the Court on these points;

First, Whether there was sufficient proof of the will of *Philip Brice*, the grandfather of the plaintiff, under

in the will a condition to pay a sum of money, in the declaration he only set forth the devise, nor the condition, and held to be no objection.

The attestation of a will of land need not state that the witnesses subscribed their names in the presence of the testator.

(a) By *Hawkins* Serjt. for the plaintiff and by *Chepple* King's Serjt. for the defendant; it had been argued before by *Wright* Serjt. for the former and *Eyre* King's Serjt. for the latter.

B

whom

them he claimed a right that he sometimes were ill
 and he was not out of the pretension further un-
 derstood his name in the pretence of the estate.

Secondly, Whether he had selected a declaration
 was applicable to the issue, the issue under which the
 plaintiff claimed being in question, and the condition re-
 quired in the declaration.

Thirdly, Whether he was of the will created in
 answer to the bill he father of the defendant.

If on any of the points have been already determined by
 the Court, that the will was well proved, and that the
 copy was sufficiently authenticated. They were determined
 before I came on the bench, nor I am aware of the same
 opinion. If the last point was to be determined in the case of
Hardy v. Jones, Tr. 1736, B. C.

As to the third, this remains to be considered, and it
 depends entirely on the construction of the will of *Philip*
Stiles the grandfather, bearing date the 28th of July 1683.
 The words of the will, so far as they relate to the present
 question, are "I give and devise unto my son *Philip Brice*
 (who was the father of the plaintiff) all that my freehold
 mortgage or tenement and so much of the freehold belong-
 ing thereto as doth lie from the stakes there driven into
 the ground and fastened into the river there on the east
 side (which are the premises in question) from and after the
 death of my wife *Maryard* unto the said *Philip Brice*
 my son and his heirs for ever, on this condition that he
 shall pay unto my son *William Brice* 30*l.* within one year
 after the death of my wife, and in case he shall not pay
 the said 30*l.*, then I give the same unto my son *William*
Brice to enjoy the rents and profits until he be fully satis-
 fied his said 30*l.* and no longer." Then he gives several
 other bequests to several other of his sons and their heirs
 for ever. Then follows this clause: "Item my will and
 mind is that in case any of my said children, unto whom
 I have bequeathed any of my real or copyhold estates,
 shall die without issue, then I give the estate of him or them
 so dying unto his or their right heirs for ever."

The

The question is whether by these words *Philip*, the devisee, had an estate in fee or in tail? and this was divided into two questions;

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against
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1st, Whether he would have had an estate-tail in case the remainder had been devised over to a stranger? 2dly, Whether devising it over to the right heirs of the person so dying without issue makes any difference?

As to the first question; it cannot be doubted now, after so many solemn resolutions, but that if a man devise an estate to *A.* and his heirs, and afterwards in his will give his estate to another in case *A.* dies without issue, the subsequent words reduce *A.*'s estate only to an estate-tail, and restrain the general words "heirs" to signify only "heirs of the body." So likewise if a man devise an estate to *A.*, or to *A.* for life, without saying more, and afterwards in the same will devise the estate to another in case *A.* dies without issue, these subsequent words will enlarge *A.*'s estate by implication and give him an estate-tail. And this is founded upon these known rules, that the intention of the testator shall always take place in the construction of wills so far as it can be collected from the will itself, and if it be not contrary to the rules of law; and that the priority or posteriority of words in a will (*a*) is not at all regarded, but that the whole will must be taken together to find out the intent of the testator. The cases of *Soullé v. Gerrard* reported in *Cro. Eliz.* 525, *Dutton v. Engram* reported in *Cro. Jac.* 427, and *Whalley v. Reede and Hall* in 1 *Lutw.* 804 and 811, cited by my Brother *Hawkins* counsel for the plaintiff, and many other cases that might be cited, are cases express to this purpose. But this point has been now so often determined, that my Brother *Chapple*, who was counsel for the defendant, did not seem much to dispute it.

2dly, But he seemed chiefly to rely on this distinction that though it would have this construction in case the remainder had been devised over to a stranger, it will be otherwise in the present case, because the remainder

(a) The same rule also obtains in the construction of deeds, *Dougl.* 690. 3d ed.

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is devised over to the heirs of the person so dying without issue (a). But this distinction, though it seems at first to be of some weight, when considered makes no difference either in reason or law. Even in grants, where words are construed much stricter than in the case of a will, if there be words that create an estate-tail, the grantee will have an estate-tail, though the *next* remainder be limited to his heirs. And nothing is more common in settlements than to limit an estate to a man and the heirs of his body, remainder to his right heirs; and for this plain reason, to prevent his disinheriting his issue except by some solemn act done in his life-time. If so plain a point wanted the authority of any cases, the case of *Turnman v. Cooper*, *Cro. Jac.* 476. and several cases mentioned in 2 *Rol. Abr.* 66 and 68, are cases in point to this purpose. It is said in *Co. Lit.* 21 and in *Altham's case* 8 *Co.* 148. that if a man by deed grant an estate to a man and his heirs to hold to him and the heirs of his body, he shall have only an estate-tail, and not even a fee-simple expectant unless the remainder be limited to his heirs: but that if it be granted to one and the heirs of his body to hold to him and his heirs, he shall then have an estate-tail and a fee-simple expectant. And the present case arising on the words of a will is much stronger as to this construction.

We are therefore all of opinion that *Philip* the father of the demandant took only an estate-tail by the words of the will, and consequently that the verdict being for the demandant but the postea being stayed till the opinion of the Court was had it must now be delivered to the demandant, in order that he may enter up his judgment (b)."

(a) By the words "die without issue" the deviser must either have meant, "dying without heirs of the body," or without heirs generally; but to suppose that he used those words in the latter sense would be to suppose that he intended to devise the lands "to his son *P. Bruce* and his heirs for ever, and if he die without such heirs then to *the same* heirs." There seems therefore less doubt respecting the deviser's intention in such a case than in the ordinary case of a limitation over to a stranger after "a dying without issue by the first taker."

(b) This case is reported in *Com. Rep.* 539. and 2 *Eq. Ca. Abr.* 317. pl. 32; but no notice is taken of the second point of this case in either of those reports, nor do the reasons given by the Court there appear. There is also a little inaccuracy in them both in the first point, in saying that "no subscription was signed sealed and published &c, but only the names of the witnesses subscribed;" the attestation was thus "Signed sealed published and declared by the said testator to be his last will and testament in the presence of us, J. T., J. T., P. H."

WILLIAM HARVEY *against* GEORGE STOKES.

[E. 7 GEO. 2. Rol. 934.]

THE opinion of the Court was thus given by

Willes Lord Chief Justice. "This comes on upon the defendant's demurrer to the plaintiff's replication,

Debt on a bond for 150*l.* entered into by the defendant to the plaintiff as sheriff of the county of *Essex* 3d of *March* 1732.

The defendant prays oyer of the condition, which is that "if the above bounden *Rebecca Stokes* shall appear at the next county court to be holden at *Witham* or elsewhere in the said county of *Essex*, and then and there do prosecute her action with effect against *Thomas Hawkins* gentleman for taking and unjustly detaining her cattle goods &c, and do also make return thereof, if return thereof shall be adjudged by law, and also do save harmless and indemnified the said sheriff his under-sheriff deputies and bailiffs touching and concerning the replevying and delivery of the said cattle &c, then this obligation to be void &c." And pleads that the plaintiff ought not to have his action against him, for that *Rebecca Stokes* in the condition named did appear at the next county court held after making the said bond viz. 13th of *March* 1732, and then and there did prosecute her action with effect against the said *Thomas Hawkins* in the said condition mentioned for taking and unjustly detaining her said cattle goods and chattels in the same condition mentioned, and that no return thereof was adjudged; and also that the said sheriff his under sheriff deputies and bailiff or any of them have not been damnified touching or concerning the replevying or delivery of the said cattle goods and chattels or any of them; and this he is ready to verify; wherefore he prays judgment &c.

The plaintiff replies that the plaint and action in the said condition mentioned were afterwards, to wit, on the *Morrow of the Ascension* of our Lord in the sixth year of

necessary, it being in the negative; adly, that the mistake of the name of B. for A. was fatal, and might be taken advantage of on demurrer, though not assigned as cause of demurrer. *Com. Rep. 356. S. C.*

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Easter
Term,
10 Geo. 2.
Saturday,
May 21st.

To debt on a replevin bond, defendant pleaded that A. (the party replevying) did prosecute his suit with effect, and that no return of the goods was adjudged to B. (the party distraining:)-plaintiff replied that a return was adjudged to B., nevertheless the said B. did not make return &c. "and this he is ready to certify &c;" special demurrer, for that the plaintiff had not verified his replication:—Held, 1st, that certify should be taken to mean verify; and that even no verification was

the

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the reign of his present Majesty removed by his Majesty's writ of recordari into his Majesty's Court of Common Pleas, and thereupon such proceedings were had in this court that afterwards, viz in *Trinity Term* sixth and seventh of his said Majesty's reign by reason of the default of the said *Rebecca* it was considered by this court that the said *Rebecca* and her pledges of prosecution in that behalf should be in mercy, and that the said *Thomas Hawkins* should be without day, and that he should have return of the cattle goods and chattels aforesaid, as by the record thereof remaining in this court here doth more fully appear; and therefore the said *Rebecca* did not prosecute her action with effect; nevertheless the said *Thomas* did not make return of the said goods and chattels according to the tenor of the said condition of the said bond; and this he is ready to certify; wherefore he prays judgment &c.

The defendant demurs; and for cause of demurrer shews that the said William hath not verified his said replication, and for that the replication is uncertain and without form,

Two objections (a) were taken by the counsel for the defendant;

First, that the replication does not conclude rightly; it being "and this he is ready to *certify*," instead of "this he is ready to *verify*;" and this is assigned as cause of demurrer,

Secondly, that the breach assigned in the replication is, *Thomas* did not make return of the said cattle goods and chattels according to the tenor of the condition of the said bond, instead of *Rebecca*. This is not shewn as a cause of demurrer, but was insisted on as a matter of substance.

At the time when this matter was spoken to, the Court were of opinion that the first objection was of no weight; for that *certificare* should be taken to signify the same as *verificare*; and for that this part of the replication need not be verified by the plaintiff, it being in the negative; according

(a) This case was argued on *Friday May 13th* by *Parker King's Serjt.* in support of the demurrer and *Wright Serjt.* against it.

to the rule in *Co. Lit.* 303. a. which was cited at the bar. And I will add this further reason why this is well enough, because it is one of those defects which are expressly cured after verdict by the statute 16 & 17 Car. 2. c. 8. ; and upon a demurrer by the 4 & 5 of *Anne* c. 16. (a)

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But as to the second exception, it seems to be of great weight, and to be matter of substance and not of form ; for that part of the replication where *Thomas* is mistaken for *Rebecca* is the only breach that is assigned to maintain the plaintiff's action, and therefore may be insisted on by the defendant, though not shewn as cause of demurrer.

But it was said that it is helped either by the statute 8 Hen. 6. c. 12. and c. 15, for by the 16 & 17 Car. 2. c. 8., or the statute 4 & 5 An. c. 16. for the amendment of the law. But on consideration we think that it is such a defect as is not cured by any of these statutes. It is said in *Blackmore's* case, 8 Co. 162. that there are fourteen misprisions, to which the statutes of Hen. 8. do not extend, and one of them is a " Jeofail or insufficient pleading or any other default of the party or his counsel," for those statutes extend to misprisions of clerks only ; and this seems directly to be the present case. The case in *Cro. Jac.* 13. *Philips v. Rice Hugre* is exactly agreeable to this. Error on a judgment in C. B. in audita querela. The question was concerning an annuity payable to one *John Bush* at a certain time and place ; the plaintiff insisted that he tendered the annuity but that *John Bush* was not there to receive it ; defendant, protestando &c, pro placito idem *John Bush* dicit that he was there to receive it ; the plaintiff demurred ; held that it was no plea, for that it was pro placito idem *Johannes BUSH* dicit, instead of *RICE* ; it was urged that these words " idem *Johannes Bush*" were void words, and amendable, the plaintiff not having assigned it for cause of demurrer. But, per Curiam, it is not amendable, because it is the substance of the plea, and not the misprision of a word only ; and, as

(a) But quære ; it being " specially shewn for cause of demurrer." See 4 An. c. 16. f. 1.

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Stannard
against
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it is, there is no plea at all (a). There is like case in *Cro. Jac.* 88; *John Thomas* executor of *Nicholas Joyce v. William* Assumpsit. Promise laid that, in consideration that the said *Nicholas* would deliver unto him (the defendant) on request 40^l, he would repay it on such a day; and the declaration was, quod item *Nicholas* in factis diebus quod ipse idem *Nicholas* delivered to him the 40^l. &c. Non assumpsit pleaded, and verdict for the plaintiff. But judgment was arrested; for though it was said that this was the mistake of the clerk only, "yet it was resolved that it could not be amended, for that it was the very substance of the declaration, and no precedent fact to induce thereto; and that it was not a case where the issue is between *John* and *William*, and the issue is quod idem *Johannes* petit quod inquiratur per patriam, et prædictus *Johannes* similiter; for that is merely the default of the clerk, where he had a precedent record to guide him how he should join issue." But here it is the default of the plaintiff in his replication. The cases of *Birton v. Mandel* reported in *Cro. Jac.* 67, and by another name in *Yelverton* 65, *John Villa v. James Villa*, *Cro. Eliz.* 435; *Coston v. Coston*, *Cro. Eliz.* 752; and *Russell v. Grange*, *Cro. Eliz.* 904; are after a verdict, and only a mistake of the plaintiff's name for the defendant's; so do not come up to the present case. And so are the cases of *Leeser v. West*, *Cro. Jac.* 444., and *Meredith's* case, 1 *Vent* 217. (b), which were cited for the plaintiff by Serjt. *Wright*. The case of *Ron v. Barnes*, 2 *Lev.* 117. comes nearer to the present case, it being on a demurrer: but there it was only the mistake of the plaintiff's name for the defendant's, which is very different from the present case,

It remains therefore only to be considered whether this defect be helped either by the statute 16 & 17 *Car.* 2., or by the statute 4 & 5 *Anne*. The statute 16 & 17 *Car.* 2. only cures defects after a verdict, and only where the christian or surname of the plaintiff or the defendant, demandant or tenant, is mistaken, where it is right in any part of the preceding roll or record, so it does

(a) See also *Britton v. Cole*, *Carth.* 443.

(b) The cases of *Abrabat v. Hunn*, *Com. Rep.* 250, and *Blacklock v. Mervin*, *ib.* 337. are of the same description.

not extend to the present case; and would not (I think) have cured this even if after a verdict, because here it is not the name either of the plaintiff or the defendant that is mistaken. The statute 4 & 5 *Anne* seems only to extend to such cases as were helped after a verdict by the other statute, and it expressly says that sufficient matter must appear in the pleadings on which the Court may give judgment according to the very right of the cause: whereas no such matter appears upon these pleadings, there being no breach rightly assigned by the plaintiff. There was no case cited for the plaintiff since either of these statutes, but the case of *Lamplough v. Shortridge*, 1 *Salk.* 219., which was cited on the other question, and is nowise material to the present point. And I cannot find any case since the making of these statutes where such a defect as this has been cured.

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against
STOKES.

I could heartily wish that it was in the power of the Court to rectify this mistake: but we think that it is not, and are all of opinion that by reason of this mistake judgment must be for the defendant."

Judgment for the defendant.

GEORGE SHELLEY *against* GEORGE WRIGHT. Trin. 10 & 11 Geo. 2.

THE opinion of the Court was delivered as follows by Wednesday, June 29th.

Willes, Lord Chief Justice. "Debt on a bond dated 14th of May 1735 in 400l.

A party executing a deed, is estopped by the recital of a particular fact in that deed to deny such fact. Therefore where it was re-

The defendant prayed oyer of the bond, and condition, which condition was thus; and whereas the above-bound *G. Wright* has been employed under the above named *C. Shelley* in the office of Auditor of *Lincoln Nottingham Derby and Chester*, and in the office of Auditor of the

cited in the condition of a bond that the obligor had received divers sums of money for the obligee which he had not brought to account but acknowledged that a balance was due to the obligee, it was holden that the obligor was estopped to say that he had not received any money for the use of the obligee.

Where a defendant pleads matter of excuse that admits a non-performance (except in the case of an award) the plaintiff need not assign a breach in his replication.

When a plaintiff replies that the defendant is estopped to plead his plea, he may demand judgment generally.

Alienation-

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SHELLEY
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WRIGHT.

Alienation-office, and has received sundry sums of money in the said several offices as fees and perquisites due to the said *C. Shelley* as Auditor, and for which the said *G. Wright* has not yet brought any account to balance, but doth hereby acknowledge that there is a balance due to the said *C. Shelley* for money received at divers times by him the said *G. Wright* in the said *C. Shelley's* office as Auditor, and for which he doth hereby acknowledge himself indebted, and doth hereby oblige himself his heir executors &c. to pay the said balance to the said *C. Shelley* his executors &c, and the said *G. Wright* doth propose this obligation as a security to the said *C. Shelley* for the several sums of money so due to him as aforesaid, if therefore the said *G. Wright* his heirs &c, do and shall make and deliver unto him the said *C. Shelley* a true and particular state of all the fees perquisites &c. which he hath received in the said offices for the use and as the dues of the said *C. Shelley*, and pay unto the said *C. Shelley* his executors &c, the balance thereof, or give him other legal security for the payment thereof within one month, and also shall deliver &c. all books papers &c upon request, then this obligation to be void, but if default shall be made in all or any of the clauses or agreements aforesaid then to remain in full force.

First, there was a plea in abatement, which was overruled on a demurrer (a), and the defendant was ordered to answer over; and thereupon

He pleaded that the plaintiff ought not to have his action against him, for that he the said *George* [the defendant] before the suing forth of the original writ had not received any fees perquisites &c in the aforesaid offices or any of them for the use and as the dues of the said *C. Shelley*, and insisted on some other matters (b) not material to the points in question,

The plaintiff replied that the said *George* ought not to be admitted or received to plead the plea above by him

(a) See an account of that part of the case in *Com. Rep.* 562, and *Barnes* 338.

(b) Which were pleaded by way of answer to the other parts of the condition of the bond.

pleaded

pleaded as to so much thereof wherein he pleads that before the suing out of the original writ of the said *Charles* he the said *George* had not received any fees perquisites or profits in the said offices or any of them for the use and as the dues of the said *Charles*, because he says that before the suing out of the said original writ, to wit, on the said 14th of *May* 1735 the said *George* by the said condition subscribed to the said writing obligatory sealed with his seal as aforesaid acknowledged that he had received sundry sums of money in the said several offices in the condition mentioned as fees and perquisites due to the said *Charles* as Auditor as aforesaid, and for which the said *George* had not then brought any account to balance, but thereby acknowledged that there was a balance due to the said *Charles* for monies received at divers times by him the said *George* in the said *Charles*'s offices as Auditor as aforesaid, and for which he thereby acknowledged himself indebted and thereby obliged himself his heirs &c to pay the said balance unto the said *Charles* his executors &c ; which said writing obligatory with the condition subscribed the said *George* doth not deny nor to it sufficiently answer ; and this he is ready to verify ; wherefore he prays judgment if the said *George* ought to be admitted and received against his own acknowledgement by his deed aforesaid to plead the plea by him above-pleaded that he hath not received any fees perquisites &c. in the said offices or any of them for the use and as the dues of the said *Charles* as aforesaid.

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against
WRIGHT.

To this the defendant demurred generally, and the plaintiff joined in demurrer.

Hawkins Serjt., and *Comyns* Serjt. for the defendant,
Skinner Serjt., and *Parker* Serjt. for the plaintiff.

Three objections were taken by the defendant to the plaintiff's replication ;

First, That no one can be estopped by a recital.

Secondly, That there is no breach assigned.

Thirdly, That no judgment is prayed.

First ; As to the Estoppel, There are some general sayings in the books that no one shall be estopped by a recital ;

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SHEPHERD
and
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the return of the writ was, by the hands of the said *William Tutte* (the defendant) attorney on behalf of our said Lord the King and the said *Penelope Baker* in the said writ mentioned, delivered to the said *Stephen* and *John* to be executed in due form of law ; and that the said *Stephen* and *John* afterwards and before the return of the said writ by virtue of the said warrant *did gently lay their hands* upon the said *Anne* in the bailiwick of the said sheriff in the said county of *Suffex* to take and arrest her, and did then and there take and arrest her, and did keep and detain her for three days next following in their custody, as it was lawful for them to do ; which they aver to be the same assault &c.

1737.

Rowe
against
Tutte

To this special plea the plaintiffs demur generally ; and the defendants join in demurrer.

Two objections were taken (a) to the plea by Serjeant *Gapper* for the plaintiffs,

First, that *William Tutte*, one of the defendants, hath not justified ; and that, as it is a joint plea, if it be bad as to one defendant, it must be bad as to all.

Secondly, that a plea of *molliter manus imposuit* will not justify a battery.

As to the first objection ; We admit the rule as to the joint (b) plea, but are of opinion that *William Tutte* hath justified as well as the other two.

The objection is that he hath not admitted the trespass which every one that will justify must do. But it is plain that he hath ; for it is pleaded that he delivered the warrant as attorney for the plaintiffs to the other two defendants to be executed in due form of law, which (if true) if he had pleaded the general issue it must have

(a) It appears that this case was argued on *Wednesday May 4th 1737*

(b) Vide *Moravia v. Sloper*, *post* ; *M.* 1737 ; and *Morse v. James*, *post*, *M.* 1738, S. P.

been

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been found against him; for he who commands or directs another to do a trespass is guilty of the trespass if done by the other person pursuant to his direction (a).

As to the second objection: the cases, which were cited on the part of the plaintiff out of 2 *Roll.* 546, to prove that this is not a good plea, rather prove the contrary. In the cases cited out of *Cro. Eliz.* 93, and 268, it is either pleaded to the wounding or only to the rest of the trespass, and the wounding is not traversed. But in the present case the wounding is traversed, and the plea is only to the rest of the trespass. In the case of *Carr v. Donne*, 2 *Vent.* 193., cited for the plaintiff, no such thing is adjudged: but judgment is against the defendant only because he had not pleaded this plea to the battery but only to the assault and imprisonment; which seemed to imply that, if he had pleaded it to the battery, it had been a good plea (b). In the case of *Patrick v. Johnson*, as reported in 3 *Lev.* 403, judgment is given upon other points: and what is said there concerning this plea is said obiter, and shews (I think) rather that it is good; for it is said there that every laying on hands is a battery unless it be excused. The only case that seems to look the other way is the same case of *Patrick v. Johnson*, as reported by *Lutwyche*, fo. 925 and 929. But that case is there very doubtfully reported: and he seems to rely chiefly on a case of *Stoney v. Calvert*, which I cannot find, and which is contrary to all the other cases. And in the end of the report he admits (c) that it was holden to be a good plea by Chief Justice *Rede* as long ago as 21 *Hen.* 7. I believe there have been several hundred precedents since in the same form; it being the common way of pleading it. *Lutwyche* concludes his report thus, in tantâ varietate opinionum quære meliorum; and we think that the opinion of those who hold this plea to be good to be the best, not only as it is agreeable to reason and a great ma-

(a) Vide *Britton v. Cole*, *Salk.* 409. S. P. and *Moravia v. Sloper*, *post* M. 1737.

(b) Vide *Girling's case*, *Cro. Car.* 446. 7; *Marpole v. Bossett* and *Murphy v. Fitzgerald*, cited in *Moravia v. Sloper*, *post*.

(c) *Lutwyche* who was counsel in that case, and who appears much displeased with *Levinz's* assertion, admitted that there were many precedents of pleading like that in *Patrick v. Johnson*.

majority of the precedents, but likewise because it is so expressly adjudged in a very modern case; the case of *King and wife against Tibbert* in *B. R. 5 W. & M. Skinner* 387 (a).

As to the case of *Williams v. Jones*, cited for the plaintiffs, and said to be in *B. R. Tr. 10 Geo. 2. (b)*, but very little can be collected from it: The counsel could not agree in the state of it, but all agreed that it was not the point in question, but that the only question was whether cepit et arrestavit would justify a battery, as

(a) Also reported in *Comb. 227*. by the name of *King and Wife v. Peppard*.

(b) That case has been since reported in 2 *Str. 1049*, and *Caf. Temp. Hardw. 298*: there the arrest was pleaded as a justification to the battery, and the Court held the justification to be insufficient. But according to the report of it in the latter book, in which alone the reasons of the Court appear, Lord Hardwicke Chief Justice said "Upon consideration of the cases we are of opinion that a battery cannot be justified by shewing an arrest barely, but that in order to make it good something further should be shewn, as that the defendant gently laid his hands in order to arrest and did arrest him, as in the case of *Patrick v. Johnson*, though that way of pleading has been doubted of; or else that the plaintiff made resistance and was going to rescue himself and by reason of that he beat him to take him."

Indeed in *Truscott v. Carpenter*, 1 *Ld. Raym. 229*: the Court said "where an express battery is laid, it is not enough to justify the imprisonment upon legal process which includes a battery, but the defendant ought to go on and shew that he arrested the plaintiff and the plaintiff offered to rescue himself, and so the defendant was compelled to beat him; for otherwise if it be not on some such occasion a man cannot justify a battery in an arrest." But it is to be observed that in that case the justification was not pleaded with a molliter manus imposuit, as it was in *Patrick v. Johnson* and in the principal case here.

In *Bull. N. P. 19*. the true distinction is taken, "an officer cannot justify more than the assault by virtue of an arrest, without shewing that the plaintiff resisted or endeavoured to rescue himself, unless it be by way of molliter manus imposuit, and in that manner he may justify the beating without shewing any resistance or attempt to rescue. Vide *Tutley v. Foxall*, post, *Tr. 1758*."

In this case however, as well as in the case of a plea of resistance or an attempt to rescue, it is competent to the plaintiff to reply an unjustifiable or a subsequent battery, as suggested by *Kingsmill* Justice in the case in 21 *H. 7*. "que puis eel metter de ses mains le defendant batir le plaintiff."

A defendant may also justify an assault and battery in the defence of his possession of lands or goods, by pleading molliter manus imposuit &c; *Bro Abr. "Trespasi," pl. 128*; 2 *Roll. Abr. 548. pl. 2*; and 549. *pl. 9, 10*; and 2 *Inft. 316*. If actual force be used, the defendant may resist force by force; *Green v. Goddard*, *Salk. 641*; and *Weaver v. Bush*, 8 *Dunf. and East 78*; and according to the latter case he need not plead molliter manus imposuit &c. There, to trespass for an assault and battery the defendant pleaded that the plaintiff with force and arms and with a strong hand endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance &c, and if any damage happened to the plaintiff it was in the defence of the possession of the said close; and it was holden to be a good plea.

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not (in the opinion of the Court) necessarily implying laying on hands, which seems rather to imply that this plea is good. But, be that case as it will,

We are all of opinion, for the reasons aforesaid, that the defendant's plea is good, and that judgment ought to be for the defendants."

Friday,
Nov. 11th.
Mich. 11 G.
2.

ANDREW CROSSE, HENRY CROSSE, and WILLIAM
KROGER, *against* RICHARD PORTER (a).

If it do not appear on the record that there is a condition to a recognizance, on which an action is brought, the Court will not intend that there is any condition.

“DEBT on a recognizance entered into by the defendant to the plaintiffs and one *T. Chancy* deceased in the sum of 537*l.* before the Lord Chief Justice on the 12th of *November* 10 *Geo.* 2. The recognizance as set forth in the declaration is absolute, without any condition; at least none appears. The breach assigned is that the defendant did not pay the said sum to the plaintiffs and *T. C.* in his lifetime, nor to the plaintiffs after his death, but hath refused and still doth refuse to pay the same, though often requested. Damage 20*l.*

A general demurrer by the defendant, and the plaintiffs join in demurrer.

Comyns Serjt. for the defendant alleges two reasons why the plaintiffs cannot have judgment.

1st, They have not set forth the condition of the recognizance;

2dly, No breach is assigned.

First; It is held necessary in the case of a recognizance, though not in the case of a bond with a penalty, because the recognizance and condition make but one entire record. He cited the case of *Atterbury v. Ward* (b), *B. C.* there nul tiel record was pleaded, and so the condition

(a) This case is shortly reported in *Barn.* 339. 4to edit.

(b) Since reported in *Barnes* 60.

appeared

appeared; and the case of *Loder v. Lowth, B. C.*: but there oyer was prayed, and so the condition was set forth on the record.

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Draper Serjeant for the plaintiffs. The Court cannot suppose a condition. It may be an absolute recognizance; and so it appears to be as set forth in the declaration. Secondly, a breach is clearly assigned, *viz.* non-payment.

Per Curiam.

There may be an absolute recognizance as well as a recognizance with a condition. It does not appear to the Court that this is a recognizance with condition; it must be taken to be an absolute one, since no condition is set forth. We admit that where a condition appears on record it must be set forth in the declaration, because a recognizance and condition make but one record. The cases cited are different from the present; for in the one nul tiel record was pleaded; and in the other oyer of the condition was prayed; and so it appeared to the Court in both cases that there was a condition. The defendant might have pleaded nul tiel record, or prayed oyer in the present case. In the case of a recognizance of bail, if a *scire facias* be brought against the manucaptors, it appears to be a recognizance with condition, and therefore it is necessary to set forth the condition (a). But that is different from the present case.

Secondly; a breach is plainly assigned, *viz.* non-payment of the money.

So judgment for the plaintiffs' (b).

(a) So, in debt on recognizance of bail, it should be stated in the declaration at whose suit the defendant became bail and for what; *Park v. Tisbury*, 1 *Wils.* 284.

(b) See also precedents of such declarations as the present in *Bre. Entr.* 164. *pl.* 28; 29.

1757.
 March 11th.
 Trinity.
 Nov. 14th.

JOHN SMITH *against* JOHN RICHARDSON (d).

In an action for words that impute felony & treason, the defendant cannot give in evidence the truth of them on the general issue.

CASE. This comes before the Court on a case made by Mr. Baron *Fortescue* at the last *Lent* assizes for the county of *Oxford*, and reserved for the opinion of the Court.

The action was for scandalous words spoken by the defendant of the plaintiff; damages 500*l*. Several sets of words were laid; but the most material ones are, "*John Smith is a rogue and hath stolen my beer; and John Smith has robbed me of my beer.*" It was laid that the plaintiff was beer butler of the college of *Christchurch* in *Oxford*, and that by reason of the speaking of these words he was not only injured in his reputation but likewise turned out of his place. Verdict for the plaintiff, and damages 100*l*.

The Judge allowed the defendant to give the occasion and manner (b) of speaking the words in evidence: but the defendant, to mitigate the damages, offering to prove the truth of the words, and that the plaintiff was really guilty of the felony mentioned in the declaration, the Judge would not permit it, but reserved this point for the opinion of the Court, whether the defendant could, in mitigation of damages, give in evidence that the plaintiff was in truth guilty of the felony mentioned in the declaration.

When this came before the Court, there were several cases cited by the counsel that bore some resemblance to this case, but there was no case cited in point.

This therefore being a new case, and a case of great consequence, the Court thought proper to desire the opi-

a. This case is thereby reported in Barn. 193. 4to edit. in Com. 551; and in 10 Mod. 108.
 b. See also the case of *John Smith* in 10 Mod. 108, 109; and 1 *Lev*, 82.
 The case of *John Smith* is also reported in 3 *Wm. & M.* 278, where it was held that a person is not liable to publish the proceedings of the House of Commons in a newspaper, reflecting on the proceedings of the House of Commons, if the publication contain a fair representation of the proceedings. This point was also ruled by the Court of King's Bench in *John Smith*, where it was held, though in that case the defendant could avail himself of that defence.

nion of the rest of the Judges not only to guide their own judgment but that there might be an uniformity of opinion for the future in a matter of so great moment. Accordingly the Lord Chief Justice summoned all the Judges to his Chambers in *Serjeant's Inn*, and all of them met there on *Friday* last ;

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And they were all twelve unanimously of opinion that where the words import a general felony, as " thou art a thief," or " thou stolest a horse" or any other thing, not specifying whose it was, or when or where it was stolen, the defendant ought not to be allowed on the general issue to give the truth of the fact in evidence in mitigation of damages.

But in respect to the present case, and where the words import a particular felony, as " he has stolen my beer," there was a variety of opinions amongst the Judges whether such evidence ought to be received or not on not-guilty pleaded. Eight of the Judges were of opinion that in no case whatever, where the words imported felony or treason, such evidence ought to be admitted upon not-guilty pleaded: but four were of opinion that it might, where the words imported a particular felony.

Those, who were of opinion for not admitting such evidence in any case whatever where the words imported felony or treason, were so principally for these reasons ;

First ; They thought that the Judges had gone far enough already in admitting such evidence to be given in mitigation of damages on the general issue which might and ought to be pleaded in bar by the rules of the common law, and thought that it was not proper to go any farther.

Secondly ; That there could be no inconvenience or ill consequence in rejecting such evidence, because the party has an opportunity of pleading it : but that admitting it might be attended with very ill consequences and great injustice to the plaintiff. For even where a particular felony is charged, as in the present case, no one comes prepared to defend himself on not-guilty pleaded, which imports only that he did not speak the words,

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words. In the present case if the defendant were allowed to give in evidence the truth of the words, he might prove that the plaintiff stole his beer twenty or thirty years ago. And how could the plaintiff be prepared to defend himself against such a charge? He may have occasion for an hundred witnesses: if he bring them and the defendant do not go upon this, he will have no costs for such witnesses: if he do not bring them, he may be found guilty of a crime for which he is to forfeit his life without a possibility of defending himself. And the consequence of that will be not only suffering greatly in his reputation, but the Judge may send him over to the other side to be tried for his life. This is inverting the method of trial, and putting a man's life in danger contrary to justice and the known rules of law.

Thirdly; By this mean likewise the plaintiff will lose the advantage of replying, which he might do if this matter were pleaded in bar. He might insist on a pardon (a) or an acquittal, and several other matters, which he might set forth in his replication, if the fact were to be set forth specially in the plea, which defence he will be deprived of if the defendant may be allowed to give it in evidence in mitigation of damages on not-guilty; so the plaintiff will be in a much worse condition than if the defendant had pleaded it, which ought not to be.

Fourthly; Besides what is called in mitigation of damages, considering the nature of the action, is almost the same as *in bar*; for if the defendant can bring down the damages to less than 40s., the plaintiff recovers no more costs than damages.

Fifthly; By this mean likewise there may be a contrariety of determinations. A man may lose his damages by not being prepared to defend himself, and may afterwards be acquitted on the indictment when he has an opportunity given to him of defending himself.

Sixthly; If this be admitted, the judgment will be wrong; for if the words be proved to be true, the plaintiff ought not to recover at all.

(a) See *Cuddington v. Wilkins*, Hob. 81.

Seventhly;

Seventhly; A great hardship on the plaintiff; for he cannot give evidence of any particular damage unless he charge it particularly in his declaration, because (as has been said) the defendant cannot be prepared to answer it. And for the same reason witnesses called to the credit of witnesses cannot speak to particular facts.

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For these and several other reasons *Eight of the Judges* were of opinion not to receive such evidence. And there was a very strong case cited, determined by Lord *Macclesfield*, a great Judge and a great master of evidence. It was the case of the *Bishop of Salisbury v. Nash(a)*, for saying of him "He preacheth nothing but lies in the pulpit." The defendant pleaded not-guilty; and his counsel offered to give evidence of the truth of the words in mitigation of damages, but Lord *Macclesfield* refused to admit it with a great deal of indignation.

The four Judges, who were for admitting the evidence in this particular case, gave different reasons for their opinions.

First; It was said by one that it ought to be left to the discretion of the Judge when to admit such evidence and when not; but as the consequence of this might be that some Judges would admit such evidence and some not, it was thought more for the honour of the law, and for the furtherance of justice, that there should be one uniform rule in that respect.

Secondly; It was said that a very great Judge had frequently admitted evidence if doubtful whether it was evidence or not, and said he would afterwards tell the Jury how far they ought to have regard to it; but this, though the practice of a very great man, was thought to be of very dangerous consequence.

Thirdly; The cases of giving infancy, coverture, and title in evidence on the general issue, which were mentioned as cases parallel to this, are very different from this; because when they are admitted to be given in evidence, it is always in bar and not in mitigation of damages.

(a) *Bell. N. P.* 9

Fourthly;

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Fourthly; It was said that there is a difference between a plaintiff and witnesses, because witnesses come in by compulsion and the plaintiff is a volunteer. But this seems to be a distinction without a difference; for it is hard and unjust that a man, who pursues a legal method and craves the protection of the law for satisfaction for a wrong done to him, should be put under any disadvantages whatever. And yet if this rule were to be admitted, on the speaking of words of another which import felony or treason, the person of whom the words are spoken would be mad if he ventured to bring his action.

Fifthly; It was said that words are always laid to be spoken false et malitiose, and that therefore any evidence proving them not to be so ought to be admitted. It was agreed that malice is the gist of this action, and that therefore evidence proving the manner and occasion of speaking the words to shew that they were not spoken with malice has always been admitted; and the Judge very rightly admitted it in the present case. But if the truth of the words should be allowed to be given in evidence for this reason, it ought to be in bar of the action, which has never been pretended.

Several cases likewise were cited in favor of this opinion. The case of *Smithies v. Harrison* (a), tried before Lord Chief Justice *Holt*, 13 *Will.*; another case tried before Lord Chief Justice *Holt*, *Hill. 7 Will.*; and the case of *George v. Harding*, *Hil. 12 Geo. 1.* where Lord Chief Justice *Raymond* gave the defendant liberty to give in evidence, on not-guilty, the truth of words.

In the first case before Lord Chief Justice *Holt*, it was a conviction that was given in evidence which is a record; and a record is always allowed to be given in evidence even to the credit of a witness. Besides that conviction could not have been pleaded, because he was convicted only as accessory; and the words were that he was a clipper and a coiner. And it is admitted that what cannot be pleaded may be given in evidence in mitigation of damages.

(a) *Ld. Raym. 727.*

The next case is not a case of felony, so does not come up to this. Besides, though the opinion of a very great man, it was a *nisi prius* opinion and seemed a little extraordinary.

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The opinion of Lord *Raymond* was likewise in a case which did not import felony.

The present case being only a case of felony, it was not necessary to determine what might be given in evidence in other (a) cases, only in the case of treason, that being still a higher crime, and so the reason stronger, and therefore the rule is extended to that.

As therefore a great majority of the Judges are of opinion that my Brother Baron *Fortescue* has done right in rejecting this evidence, the verdict that has been given must stand."

"Note: The eight Judges, who were not for admitting this evidence, were myself, J. Page, J. Denton, B. Carter, J. Fortescue, B. Thompson, B. Fortescue, and J. Chapple.

The four, who were for admitting it, were Ld. Ch. Just. Lee, Ld. Ch. Baron Reynolds, J. Probyn and J. Comyns."

(a) The rule now extends to all cases whether the words do or do not import a charge of felony; See *Underwood v. Parks*, 2 *Str.* 1200, and the cases there referred to in the notes in the octavo edition.

CATH. COSSENS, Administratrix of THOMAS M 11 G. 2.
HOWARD against B. COSSENS. Tuesday,
Nov. 21d.

[M. 11 Geo. 2. Rol. 642.]

"DEBT on bond. The defendant prays oyer of the Debt on condition, which is that, in case a marriage be- bond given tween the defendant and *Joan Maynard* take effect, if the defendant on his marriage, with condition that he would permit his intended wife either during the marriage or by will to dispose of 50l. out of his personal estate: Plea, that defendant had not prevented his wife disposing of that sum: Replication, setting forth a particular disposition of the money by the wife, and a request on defendant to pay, and a refusal by him: Rejoinder, that defendant had not any personal estate out of which he could pay the 50l.—Held on demurrer that the rejoinder was ill.
1st, Because it was a departure from the plea; 2dly, because it would have been no defence if pleaded at first.

said

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We are of opinion that the replication is not good, for the time of limitations must be computed from the time when the action first accrued (a) to the testator, and not from the time of proving the will. The proving of the will gave no new cause of action, and therefore the time of proving the will is perfectly immaterial.

If it were otherwise, it would make strange confusion; for then if a person died a month, or a week, or a day, before the six years expired, the executor or administrator must have six more years; and the same rule would hold in case they died before the six years elapsed, the second executor or the administrator de bonis non must have another six years. And by the same rule the assignee of a commission of bankrupt must have a new six years, though the contrary was expressly determined in the case of *Ashbrooke v. Manby* in *B. R.* 3 & 4 *Jac.* 2. reported in *Comb.* 70 (b). Though *Comberbach* was cited as an authority for the plaintiffs, I can find no case there that is so: only in the case before mentioned it was said by *Holt* that the plaintiff being an assignee of a commission of bankrupt should have a new six years from the time of the assignment: but this was before *Holt* was a Judge; and what he said there was only as counsel, and the whole Court were of another opinion. And this notion seems the more absurd, because it is directly contrary to the rule concerning the limitation of actions brought for real estates founded on the same statute (c), where it is held that if the time once begin to run, it shall run even against infants and females covert.

(a) The words of the statute 21 *Jac.* 1. c. 16. s. 3. are that actions upon the case shall be commenced and sued "within six years next after the cause of such actions or suits, and not after."

(b) The same point was also ruled in the case of *The South Sea Company v. Wymondsell*, 3 *P. Wms.* 143; and also in *Gray v. Mendez*, 1 *Str.* 555, according to a manuscript note of which it appears, that a case, supposed to have received a contrary determination in 1653 and mentioned in 2 *Lev.* 166., was cited by Mr. *Wearg* the plaintiff's counsel and overruled.

(c) The same construction has also been put upon the statute 4 *Hen.* 7. c. 24. respecting the time within which an entry must be made to avoid a fine. *Stowel v. Lord Zouch Saintmaure and Cantelupe*, *Plowd.* 355; *Doe d. Doreux v. Jones*; 4 *Durnf. & East* 300; and *Doe d. Griggs v. Shans*, *M.* 28 *Geo.* 3. *B. R.* 4 *Durnf. & East* 306, note b.

The

The cases of *Lethbridge* and *Richards v. Chapman* (a) determined here and in *B. R.*, of *Wilcocks v. Higgins* (b) determined in *B. R.* and that of *Kinsley v. Hayward*, 1 *Lutw* 256., cited for the plaintiffs, go quite on another principle; for in all those cases an action was commenced by the testator or intestate within the six years, and pursued (c) in a reasonable time by the executor or administrator; and therefore those were adjudged (as it was said) upon the equity of that clause in the statute 21 *Jac.* 1. c. 16. which gives a year after judgments or outlawries reversed; and it is not pretended in any of them that the executor or administrator shall have a new six years.

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The case of *Booth v. Johnson* was cited out of *Farrelly* (d) and *Lilly* (e): but *Lilly* is a book of no great authority; and as it is reported in the other, it is said that the plaintiff had judgment in this court, and that it was afterwards affirmed in the Court of King's Bench because the defendant had pleaded the statute of Limitations ill. And if so, the plaintiff's replication could never come in question.

We are therefore of opinion that the plaintiff's replication is not good for this reason (f).

But there is another reason also not mentioned by the counsel, because all the promises in the declaration are laid to be made to the testator; and where they are so, it is held in the case of *Green v. Cooke*, *M.* 3 *Ann.* *B. R.*, and reported by the name of *Dean v. Crane*, *Salk.* 28, and 6 *Mod.* 309, that an executor cannot give evidence of a promise to himself (g) within six years; and if he

(a) Cited in 15 *Vin. Abr.* 103.

(b) 2 *Str.* 907; *Fitzg.* 170, 289; 1 *Barnard.* 335, 349, 382; & 2 *Barnard.* 5.

(c) See *Karver v. James*, *post.* *Trin.* 1741, and the cases there cited.

(d) 7 *Mod.* 143.

(e) *Lilly* 471. S. C. in 2 *Ld. Raym.* 838. by the name of *Gould v. Johnson*.

(f) This case is distinguishable from that of *Curry v. Stevenson*, *Carth.* 335, *Salk.* 421, and *Stin.* 555. where it was said that the administrator shall have six years from the time of granting the administration, because there the statute of Limitations had not begun to run in the intestate's lifetime, the money not having been received by the defendant until after the death of the intestate; (though this circumstance is not noticed in the abridgment of the case in 1 *Com. Dig.* 168, or in the former edition of *Bac. Abr.* vol. 4. 479;) and also from *Stanford's* case, *Cro. Jac.* 61, and 5 *Rep.* 124. b. for a similar reason.—The first point decided in the principal case (*Hickman v. Walker*) seems also to have been determined the same way in *Smith Executor of God v. Hill Executor of Clark* 1. *Wils.* 134.

(g) See *The Executors of the Duke of Marlborough v. Widmore*, 2 *Str.* 890.

CANNOT

1737. cannot, setting forth a promise to himself in his replication as the executors have done in the present case is a departure in pleading; and for that reason also the replication is not good.

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We are therefore of opinion that judgment must be for the defendant."

M. 11 G. 2. MOSES MORAVIA against ROBERT SLOPER JUR. WILLIAM SALMON, JAMES WILLIAMS, and JAMES PARKER (s).
Monday,
Nov. 12th.

[M. 10 GEO. 2. Rd. 1737.]

When the party (the plaintiff below) pleads a justification under process of an inferior court, he must shew that the cause of action arose within the jurisdiction of that court: but the officers of the court need not.—Whether it be not necessary to state in such a plea the nature and extent of the jurisdiction of the court below? Qu.

THE opinion of the Court was delivered as follows, by

Willes, Lord Chief Justice. "The action is for an assault, battery, wounding, and false imprisonment.

The defendants join in their plea, and plead the general issue not-guilty as to all the trespasss, except the assaulting, imprisoning, and keeping and detaining the said *Moses* in prison for the space of twenty-eight days. And as to that they justify in this manner;

They say that the borough of *Devizes* is an ancient borough; and that before the time &c to wit on *Friday* the 9th of *May* 1735 at a Court of Record of our lord the now King in and for the said borough in the Guildhall of the same borough and within the jurisdiction of the said court before the mayor recorder and three of the capital burgesses (naming them) being counsellors of the said borough according to the liberties and privileges of the same then held by virtue of letters patent of

—A capias cannot be issued out of an inferior court without a precedent summons to warrant it: but if it be pleaded that at one court the plaintiff below levied his plaint and such proceedings were thereupon had that at a subsequent court a capias issued, it will be intended that a summons issued first; but such intendment will not be made where the capias issued at the same court.

—A principal officer, to whom returnable process is directed, must shew that it is returned, but a subordinate officer need not.

(s) This case is shortly but inaccurately reported in *Gen. Rep.* 574.

Car.

Car. 1. late King of *England*, 5th of *June* in the 15th year of his reign, granted to the mayor and burgesſes and their ſucceſſors, one *James Batten* in his proper perſon came and then and there levied his plaint againſt the ſaid *Moses Moravia* of a plea of treſpaſs on the caſe, to the damage of the ſaid *James Batten* 40*l.*, and found pledges to proſecute his ſaid plaint, and prayed that due proceſs of law might be awarded againſt the ſaid *Moses*, which was then and there granted him; and thereupon ſuch further proceedings were had in the ſaid court according to the tenor of the ſaid letters patent that afterwards to wit at that ſame Court of Record &c held the ſame *Friday* the ſaid 9th of *May* 1735 before the ſaid mayor &c by virtue of the ſaid letters patent there iſſued out of the ſaid court a certain precept of our ſaid lord the now King directed to the then bailiffs and ſerjeants at mace of the ſaid borough and every of them being then and always afterwards until and after the return of the ſaid precept miniſters of the ſaid court, by which ſaid precept the King commanded them and every of them that they ſhould take the ſaid *Moses Moravia* and him ſafely keep ſo that they might have his body before the mayor &c at their next court of the ſame borough to be holden in the *Guildhall* there on *Friday* the 6th day of *June* then next to answer to the ſaid *James Batten* of a plea of treſpaſs on the caſe, to his damage 40*l.* &c; which ſaid precept was duly indorſed on affidavit duly made for the ſum of 40*l.* according to the form of the ſtatute &c; and the ſaid precept ſo indorſed was afterwards and before the time when &c viz. on the ſaid 9th of *May* 1735 at the borough aforeſaid by the ſaid *William Salmon*, then and there and until the return of the ſaid precept attorney for the ſaid *James Batten* retained by him to proſecute the ſaid ſuit and at the requeſt of the ſaid *James Batten*, delivered (a) to the ſaid *James Williams* and *James Parker* then and from thence until the return of the ſaid precept bailiffs and ſerjeants of the mace of the ſaid borough and miniſters of the ſaid court to be by them executed in due form of law, and the ſaid *James Williams* and *James Parker* were then and there requeſted as well by the ſaid *William Salmon* as by the ſaid *James*

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(a) Vid. *Rowe v. Tutte*, ante 15; where it was holden, on demurrer, that the delivery of proceſs by one to another to be executed is an admission of the treſpaſs in order to juſtify it.

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Batten and *Robert Sloper* the younger to execute the same ; by virtue whereof the said *James Williams* and *James Parker* at the request of the said *James Batten* and also of the said *William Salmon* his attorney and of the said *Robert Sloper* the younger afterwards and before the return thereof viz. on the said 9th of *May* 1735 at the borough aforesaid within the jurisdiction of the said court took and arrested the said *Moses* by his body and kept and detained him in their custody there for the space of twenty-eight days, as it was lawful for them to do ; and the said *James Williams* and *James Parker* at the return of the said precept viz. at the said court held at the said Guildhall within the said borough by virtue of the said letters patent before the said mayor and three of the capital burgesses (naming them) being counsellors of the said borough on the said 6th of *June* then next returned the said precept duly served and executed, which is the same assaulting, imprisoning &c ; wherefore they pray judgment &c.

To this plea the plaintiff demurred generally ; and the defendants joined in demurrer.

It was said for the plaintiff that this being a joint plea of all the defendants, if it be not a good justification as to any one of them, it will be a bad plea as to all ; and this was admitted by the counsel for the defendants, and cannot be disputed now, it having been so often determined, *Vid. Smith v. Bouchier*, *M. 8 Geo. 2. B. R. (a)*

Several objections (*b*) were taken to the plea ;

First ;

(*a*) This case has been since reported in 2 *Str.* 993. See also *Middleton v. Price*, 2 *Str.* 1184. and *Morse v. James*, *post. Mich.* 1738.

(*b*) This case was argued on the 21st of *June* and 12th of *November* 1737 by *Draper* and *Agar* Serjts. for the plaintiff, and by *Eyre* and *Parker* King's Serjts. for the defendants. On behalf of the plaintiff were cited, in support of the first and second objections, the case of *The Marshalsee*, 10 *Co.* 69 ; *Higginson v. Martin*, 2 *Mod.* 195 ; *Martin v. Marshall*, *Hob.* 63 ; *Turner v. Folgate*, 1 *Lev.* 95 ; *Adams v. Vernon*, 3 *Lev.* 243 ; *Cotes v. Mitchell*, 3 *Lev.* 20 ; *Britton v. Cole*, *Garth.* 443 ; *Peacock v. Bell*, 1 *Saund.* 73 ; *Strode v. Deering*, 2 *Sbrow.* 168 ; *Jobns v. Smith*, *Cro. Jac.* 314 ; *Dennis v. Rowls*, 2 *Lutw.* 913 ; *Hargrave v. Ward*, *ib.* 1452 ; *Pinnager v. Gale*, 2 *Ventr.* 100, 2d resolution ; *Olliet v. Bessy*, *Sir T. Jon.* 214 ; *Moufe v. —*, *Yelv.* 46 ; *Bailey v. Orme*, *P. 8 Geo. 1. B. R. and Barrore v. Durbett*, *Tr. 8 Geo. 2. B. C.* ;—in support of the third objection, 2 *Rob. Abr.* 277. *D. 1* ; *Hall v. Booth*, 1 *Mod.* 236 ; *Rogers v. Muscal*, *Sir T. Raym.*

First ; that it does not set forth that the cause of action arose within the jurisdiction of the inferior court, which is necessary to be done in respect to *William Salmon* the attorney and *Robert Sloper* a stranger, though perhaps it may not be necessary in respect to the two other defendants who justify as officers of the borough. 1737.
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Secondly ; That it is not set forth what jurisdiction this court hath ; and it does not appear that this court hath any jurisdiction as to personal actions ; and that in this respect it is bad as to the officers as well as to the other defendants.

Thirdly ; That a *capias* cannot issue without a precedent summons, and that it does not appear there was any precedent summons in this case ; nay, that it is plain that there was not.

Fourthly ; That the return is ill, it not being said that the return was made at a court held before the recorder, but only before the mayor and three capital burgesses ; and that it is necessary in cases of this sort that the return should be set forth.

Before I take notice of the three first objections, I will lay the last out of the way, as being, we think, of no weight. For though we admit that the return ought to be set forth (a), being the case of the attorney and a stranger, we think it is sufficiently set forth, it not appearing to us that the recorder's presence is necessary to

T. Rayn. 128 ; *Read v. Wilmutt*, 1 *Vent.* 220 ; 2 *Lutw.* 918 ; and *Garret v. Higby*, Sir *T. Jon.* 129. ;—in support of the 4th objection, *Co. Entr.* 303, *Jebus v. Smith*, *Cro. Jac.* 314. 2d exception ; and *Cooper v. Derby*, 1721, *B. R.*

The defendants, in answer to the two first objections, relied on the cases of *Gwinne v. Poole*, 2 *Lutw.* 935, and 1560 ; *Patrick v. Johnson* ; *ib.* 926 ; *Lucking v. Denning*, *Salk.* 201 ; and *Thomf. Entr.* 302 ;—in answer to the third, *Lane v. Robinson* ; 2 *Mod.* 102 ; and 2 *Lutw.* 1565 ;—and they answered the last objection by stating the fact that the return was sufficient.

(a) A principal officer, who justifies under returnable process, must shew that the writ was returned ; *Middleton v. Price*, 2 *Str.* 1184, and 1 *Wils.* 17. : but a subordinate officer need not ; *Salk.* 409, 410 ; 1 *Ld. Rayn.* 634 ; and *Morse v. James*, *post. M.* 1738, 2d objection. But this rule is confirmed to writs on mesne process, and does not extend to writs of execution. *Hos's case*, 5 *Rep.* 90 ; *Doiley v. Joelliffe*, *Lanc.* 52 ; and *Rowland v. Peale*, *Group.* 46.

D

the

1737. the holding of a court. Vid. *Ricketts v. Bowler*, in B. R. 3 W. & M.; *Britton v. Cole*; Salk. 409; *Freeman v. Blewitt*, *ib.*; and *Girling's case*, Cro. Car. 447.

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As to the first objection; We think it a fatal objection; for though in the case of an officer, who is obliged to obey the process of the court and is punishable if he do not, it may not be necessary to set forth that the cause of action arose within the jurisdiction of the court, it has been always holden, except in one case which I shall mention by and by, and we are all clearly of opinion, that it is necessary in the case of a plaintiff himself; and if it be necessary in the case of a plaintiff, it seems to be much more so in the case of the attorney, who may be supposed to know the nature of the court and it's jurisdiction much better than the plaintiff. And we think it is stronger in the case of *Sloper*, who appears to be a mere stranger; for if a man will thrust himself into an office in which he hath nothing to do either in point of interest or of duty, as an attorney or officer, he must take care to be sure that he is in the right, otherwise it is at his peril.

The distinction between the plaintiff and the officer is expressly warranted by *Turner v. Felgate*, 1 Lev. 95. *Cotes v. Michill and others*, 3 Lev. 20; *Adney v. Vernon*, 3 Lev. 243; *Hodson v. Cooke*, 1 Ventr. 369; *Britton v. Cole*, Carth. 441; *Higginson v. Martin*, 2 Mod. 195; and *Barrow v. Durchett*, adjudged in this court Tr. 8 Geo. 2. And there seems to be a plain reason for this. For the inferior officer is punishable as a minister of the court if he do not obey it's commands; and it would be unjust that a man should be punished if he does not do a thing and should be liable to an action if he does. But it is otherwise in the case of a plaintiff: for (as it is said in the case of *Higginson v. Martin*) a plaintiff may sue if he please in the courts of *Westminster-hall* and then he will be safe, but if he will sue in an inferior court he is bound at his peril to take notice of the bounds and limits of it's jurisdiction. And though the judges in that case differed as to another matter, (the process in that case being a *capias ad satisfaciendum* after judgment, and the plaintiff in the inferior court having set forth in his declaration that the cause of action arose within the jurisdiction of the court which the defendant there admitted by

by his plea, and for this reason two (a) of the Judges were of opinion that the objection was cured,) yet they were all of opinion that if the case had been as the present case is, the plea would not have been good. And for the reasons that I mentioned before, the case of an attorney and the case of a stranger are much stronger than that of a plaintiff.

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The only case that I can find where a contrary opinion is held is the case of *Gwinne v. Poole, Jones, and Minors*, 2 Lutw. 935, and 1560, in Scacc. 4 W. & M. which was cited in this case by the counsel for the defendants, and much relied upon as an authority for them: but as it is a single case, contrary to many former and some subsequent resolutions, we think that it is not sufficient to alter the law in this respect, especially since Mr. B. Powell's argument, (though he was a very learned Judge,) which is reported at large in *Lutwyche*, seems to me to be founded on very unsatisfactory reasons (b).

His principal reasons are,

1st, That an action of trespass will not lie against the plaintiff in such case, because he may not know where his cause of action arose, and because he may not know the extent of the jurisdiction of the inferior court. But this has been answered by what I have said already and what I cited out of the case of *Higginson v. Martin*.

2dly, Because (he says) there is no case where the person doing the thing is excused, and yet the person who only procures it to be done though absent shall be a trespasser. This rule is certainly a true one where the person commanding the thing and the person doing it are under the same circumstances. But here the officer and the plaintiff are under very different circumstances, as I have already shewn, and therefore the rule does not hold. Supposing I should order a lunatic to kill a man, he would be excused as a lunatic, and yet I should certainly be hanged; which shews the absurdity of laying down this as a general rule.

(a) But according to the report in *Freem.* 322. one of those Judges (*Atkins* J.) afterwards, and after the Court had taken time to consider of the point, agreed with *North* Ch. J. and *Windham* J. that the objection was not cured by the defendant's having pleaded below. See also *Bull. N. P.* 83.

(b) In *Goslin v. Wilcock*, 2 Wils. 305. *Ld. Camden* said "Baron *Pennell* in his argument of *Gwinne v. Poole* has stated the learning of cases of this kind, but has not laid down any precise rule of law."

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3dly, Another argument which he makes use of is, that an action will not lie by an attorney of a court in *Westminster-hall* against a person who sues him in another court, if he does not insist on his privilege. But this differs both from the present case and the case in *Lutwyche* in two very material circumstances; 1st, that the process in both, under which the defendants justify, is not a *capias ad satisfaciendum*, but a *capias ad respondendum*, before any plea put in by which the defendant in the inferior court hath submitted to it's jurisdiction; 2dly, and in the case of an attorney, it is only a personal privilege, which if he will not insist on he is liable to the jurisdiction of another court as well as any other person.

There is but one reason that seems to be material, which is not mentioned by *Powell B.*, but is mentioned by *Lutwyche* in his report and appears to be so in the form of the proceedings; that the plaintiff there in the inferior court was an administrator, and so could not be supposed to know where the cause of action arose; and it is well known that for this reason executors and administrators are favoured by law, it being excused from costs and in several other respects: but this circumstance does not occur in the present case.

For these reasons, notwithstanding this case, we are of opinion that this is a fatal objection to the plea (a).

Secondly;

(a) It does not appear that the case of *Truscott v. Carpenter and Manly* T. 9 W. 3. since reported in 1 *Ld. Raym.* 229. was cited in the principal case: there to trespass for an assault battery wounding and false imprisonment, the defendants justified under mesne process out of the court of *Launceston* in *Cornwall* (not saying what court) on a plaint entered by *Carpenter* for a debt due to him within the jurisdiction of the court; the plaintiff replied that the cause of action arose at *St. New's*, absque hoc that it arose within the jurisdiction of the court of *Launceston*; and to this replication the defendants demurred.

The Court, after saying that neither the officer or party was bound to take notice whether the cause of action arose out of the jurisdiction of the court, added "If the cause of action arose out of the jurisdiction of the court the defendant in the inferior court ought to plead it; and if he do not, the affair of the jurisdiction is over, and he shall not take advantage of it in any collateral action against the plaintiff or the officer who executes the process. And so it was resolved in the case of *Gwinne v. Paul.*"

Judgment however was given for the plaintiff on account of the insufficiency of the plea.

But the opinion of the Court respecting the jurisdiction seems to be shaken not only by the case of *Moravia v. Sloper*, but also by that of *Herbert*

Secondly ; But there is another, which, if possible, is still stronger, that the defendants have not set forth what jurisdiction (a) the Court of Devizes hath, or whether it hath any jurisdiction at all in the case of personal actions ; so that for ought that appears in the plea, it may be only a court-leet. And it is consistent even with the case in *Lutwyche* to allow of this objection. For in that as well as all the cases that I can find where these sort of pleas have been holden to be good, they have expressly set forth what jurisdiction the court had, to shew that the court had a general jurisdiction of such sort of actions. For otherwise, it has always been holden that even an officer cannot justify ; as in the case of a justice of the peace, if he make a warrant to a constable to bring a man before him for a matter of which he hath a general cognizance, though he had no foundation in point of fact for granting such a warrant, or though the warrant itself be defective in point of form, yet a constable

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lett v. Good, E. 22 G. 3. B. R. at least as to cases arising in inferior courts not of record.

That was an action of debt on a judgment in the hundred court of *St. Briavel's* in *Gloucestershire* ; the declaration stating that the plaintiff levied his plaint in the court below for a cause of action arising within the jurisdiction of that court, and that such proceedings were thereupon had &c that the plaintiff recovered &c.

The defendant pleaded, besides the general issue, that the cause of action arose at *Refs* in *Hertsfordshire* out of the jurisdiction of that court, and not within &c.

To this last plea the plaintiff demurred, and contended in argument that, after judgment below, it was too late for the defendant to plead that the cause of action did not arise within the jurisdiction of the court below, and that if he had meant to take advantage of that he should have pleaded it in abatement below.

But the Court, after taking time to consider of the case, gave judgment for the defendant.

Lord Mansfield Ch. J. said, we find on looking into the record that there is no question at all, nor any room for argument. The counsel have gone into a wide field of argument not applicable, how far an officer is justified acting under the judgment of an inferior court not having jurisdiction, and how far the party is precluded after judgment from alleging that the cause of action arose without the jurisdiction. This is an action of debt on a judgment in the hundred court of *St. Briavel's* for a cause of action arising within the jurisdiction of the court. This the plaintiff takes upon him to aver, and he must have proved it under the general issue. The defendant pleads, 1st, nil debet, 2dly, that the cause of action arose out of the jurisdiction ; to this second plea there is a demurrer which admits the fact, so that it appears on the record that there was no cause of action within the jurisdiction. Besides it is not a judgment of a court of record (1) ; but like a foreign judgment (2), and not conclusive evidence of the debt.

(a) Vide *Marpole v. Bassett*, note inf.

(1) It did not appear in this case to be a court of record ; but in *Dennis v. Rowle*, 1 Lutw. 914. it was pleaded as a court of record.

(2) See *Walker v. Witter*, Dougl. 1. and the cases there referred to.

may

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may justify under it: but if he make a warrant to take up a man to answer in a plea of debt, a constable cannot justify under such a warrant, because the justice hath no jurisdiction of debts.

We think therefore for this reason that this plea is bad even as to the officers themselves.

Thirdly; the other objection likewise seems to be of weight (a), that here is a *capias* in the first instance, which was

(a) This objection was holden to be decisive in the cases of *Marpole v. Bassett* and *Piggott*, determined in *Tr. 1747, B. C.* and in *Murphy v. Fitzgerald* and another, in *Tr. 26 Geo. 2. B. C.*

The former was an action of assault battery and false imprisonment; to which both the defendants pleaded not guilty as to all the trespasses &c, except the assaulting beating and imprisoning the plaintiff &c; and as to that they pleaded a justification that at the Court of Record of our lord the King held in the *Guildhall* of the town of *Uxwessy* on the 3d of *October* 1746 by virtue of certain letters patent granted by King *Car. 2.* on the 13th of *January* in the 25th year of his reign, *Bassett* levied a plaint against the plaintiff (*Marpole*) in a plea of trespass upon the case, to the damage of *Bassett* 20*l.* for a cause of action arising within the jurisdiction of that court, and thereupon such proceedings were had in the same court that afterwards, to wit, at and in and by the same court there issued a certain precept &c against *Marpole*, directed to the Serjeants at *Mace*, by virtue whereof *Piggott*, the other defendant, one of the Serjeants &c on &c before the return of the said precept gently laid his hands on *Marpole* in order to arrest him; &c; and then and there arrested him &c.

The plaintiff demurred generally; and

Belfeld Serjt. on the 13th of *May* 1747 took two objections to the plea, 1st, That it did not set forth the nature of the court, or the extent of its jurisdiction;

2dly, That a *capias* issued in the first instance; and he relied on the case of *Moravia v. Sloper*.

The answer given by *Draper* Serjt. to the first objection was that it was stated in the plea that it was a court of record of our lord the King held in and for the town &c, and that it was expressly alleged that the cause of action arose within the jurisdiction of that court; to the second, that it was stated in the plea "that thereupon such proceedings were had &c"; that it did not appear that a summons had not issued; that a summons might be returnable on the same day; and that a summons and *capias* might issue on the same day.

But *The Court* ruled that the plea could not be supported, and gave judgment for the plaintiff on the 1st of *June* 1747. *M. S. Ld. Ch. J. Willes* (1).

The other case of *Murphy v. Fitzgerald* and *Sarky* was also an action of assault battery wounding and false imprisonment: in that also both the defendants pleaded a joint plea of justification, in which they set forth that there had been an immemorial court of record of our lord the King, within the liberty of the bishop of *Rochester* in *Kent*, held at the Palace of

(1) According to Mr. Just. *Abney's* account of this case, The Court "did not absolutely determine that the plea was bad because the jurisdiction was not set forth, though they were strongly inclined to think so: but on the second objection, they were clear that it was bad, for a *capias* in the first instance without a summons is illegal."

Rochester

was holden not to be good in the case of *Read v. Wilmot*; 1737. 1 *Vent.* 220; *Hall v. Booth*, 1 *Mod.* 236., and in several cases in *Roll's Abridgment*, and several other books. And though *Powell B.* in the argument before mentioned differs likewise from these cases and from the opinion of my Lord Chief Justice *Hale* in this respect, and says that a *capias* in the first instance in inferior courts is only a process in verso ordine and consequently erroneous and not void, and that therefore a person may justify under it, I cannot (I own) see the reason of this assertion, or know very well how to make sense of it; for by the same

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Rechefer once in every three weeks on a *Friday* before the steward of the court, for the trying and determining of all kinds of personal actions arising within the liberty &c; that at a court there held on *Friday* the 15th of *December* 1752 before *E. Wyatt* the steward the defendant (*Fitzgerald*) levied his plaint against *Murphy* in plea of trespass upon the case (1), to his damage of 20*l.*; that thereupon such proceedings were in the same court that afterwards, to wit, at the same court on the same day there issued a certain precept &c directed to *Surby* one of the ministers of the said court &c indorced for bail &c, by virtue whereof *Surby* on &c before the return of the said precept and within the jurisdiction of the court gently laid his hands on the plaintiff (*Murphy*) in order to arrest him, and then and there arrested him &c.

To this plea there was a general demurrer, and judgment was given for the plaintiff, without hearing any argument, on the authority of *Moravia v. Sloper*. M. S. Ld. Ch. J. *Willes*.

This objection, that a *capias* issued without a summons, was afterwards taken in the case of *Titley v. Foxall*, Tr. 1758, B. C. vide *post.*: but it was there overruled, it appearing on the plea that the plaint was levied at one court and the *capias* issued at a subsequent court, and this allegation being there introduced by taliter processum est &c.

These cases may be reconciled by the application of this rule, where it is sufficiently shewn in pleading that the court below had jurisdiction over the cause, every intendment (2) will be made in favor of their proceedings that can be made consistently with the facts pleaded; and therefore consistently with the facts pleaded in *Titley v. Foxall* a summons might have issued (though none was stated at the court at which the plaint was levied, to warrant the issuing of the *capias* at the next court: but no such intendment could be made in *Moravia v. Sloper*, *Marpole v. Bassett*, and *Murphy v. Fitzgerald*, because it appeared in each of those cases that the *capias* issued out of the same court at which the plaint was levied.

And though the case of *Adams v. Freeman* and *Winns*, as reported in *Sayer* 81, and 2 *Wilson* 5., appears to break in upon the above distinction, by referring to the record in the Treasury Chamber (which is entered Tr. 24 Geo. 2. 1750, *Rel.* 925.) that decision will be found to be reconcilable with all the above cases, it appearing in both pleas (which were joint pleas by both the defendants, and not separate ones by each as represented in *Sayer*.) that the plaint was levied at a court holden at *Descentry* on *Thursday* the 1st of *June*, and that the *capias* did not issue until *Thursday* the 6th of *June* when the next court was holden.

(1) Not saying for a cause of action arising within the jurisdiction of the court.

(2) Vid. *Sellers v. Lawrence*, *post.* Tr. 16 & 17 Geo. 2.

reason

MICHAELMAS TERM, 11 GEO. II. C. P.

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reason if in a superior court an exigent were to be taken out the first process, he might as well say that that was only inverſo ordine, which yet I think would be a little abſurd. This objection was indeed endeavoured to be answered, becauſe, as it is ſaid here taliter proceſſum eſt &c. it muſt be preſumed that a ſummons duly iſſued before, and that this ſort of pleading has been allowed be good. It is true that in ſome caſes it has been holden to be good, and in ſome not. Vide 2 Lutw. 913. &c. But it is plain that in the preſent caſe there could be no precedent ſummons, becauſe the capias is ſaid to iſſue at the ſame court at which the plaint was levied; ſo there could be no ſummons returned to warrant this capias. But this objection need not be relied on, as we are of opinion that the two firſt are fatal objections to this plea.

Therefore judgment muſt be for the plaintiff (a).'

(a) Vide *Jobſon v. Warner*, pag. H. 1744, 5.

Mich. 11 G.
2.
Monday,
Nov. 28th.

JOSEPH ALEXANDER *againſt* JOHN MAWMAN,
Executor of JOSEPH HOLDSWORTH.

A defend-
ant cannot
plead in
abatement
after mak-
ing a full
defence :
but he muſt
defend the
force and in-
jury when
&c. before
he can plead
in abate-
ment to the
diſability of
the perſon.
—A de-
fendant,
ſued as exe-
cutor, can-
not plead in abatement that a co-executor ought to have been ſued with him, with-
out ſhewing that the co-executor adminiſtered &c.—Where the defendant, in plead-
ing ſuch a plea, ſaid that “ he and the other executor did adminiſter divers goods &c.
where the ſaid A. B.’s (the teſtator’s)” the Court rejected “ where” as ſurpluſage, and
held the plea good.

THE following opinion of the Court was thus given
by

Willes, Lord Chief Juſtice. “ Action on the caſe on
ſeveral promiſes.

The defendant in his plea comes and defends the force
and injury when &c. and prays judgment of the writ, be-
cauſe he ſaith that the ſaid *Joſeph Holdſworth* made his
will 15th January 1735 at *Bury St. Edmonds*, and thereby
did conſtitute and appoint him the ſaid *John Mawman*
and one *John Fearley* executors of the ſaid will and after-
wards died, after whoſe death the ſaid *John Fearley* toge-
ther with the ſaid *John Mawman* as executors of the ſaid
will did there adminiſter divers goods and chattels where
the ſaid *Joſeph Holdſworth*’s at the time of his death, which
ſaid *John Fearley* is ſtill living; wherefore the ſaid *John*
Fearnley is not named in the ſaid writ, he prays judg-

ment

ment of the said writ, and that the same may be quashed.

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DER
vs
MAYNOR.

The plaintiff demurs generally, and the defendant joins in demurrer.

Two objections were taken (a) to this plea;

First, that the defendant has made a full defence, *by defending the force and injury when &c.*, and so cannot afterwards plead in abatement.

Secondly, that he has not set forth that the other executor administered, which is absolutely necessary to make the plea good.

As to the first objection; we agree that if the defendant had made a full defence, he could not afterwards plead a plea in abatement. But we are of opinion that going no farther than "defending the force and injury when &c." is not a full defence; and so it is expressly said in *Litt. sect. 195.* and *Co. Lit. 127. b.* And it is there said that a defendant must first make himself party (b) by saying *defendit vim et injuriam quando &c.*, before he can plead to the disability of the person or the jurisdiction of the court: but that if he goes on and says *et damna et quicquid quod ipse defendere debet &c.*, that amounts to a full defence; and after that he cannot plead a plea in abatement (c).

This is indeed said to be otherwise determined in the case of a plea of outlawry, 1 *Lutw. 5. Gawen v. Surby*;

(a) It appears that this case was argued on Friday, Nov. 11th, 1737, by *Prime Serje.* for the plaintiff, and *Booth's Serje.* for the defendant. By the former these authorities were cited; *Bro. Abr. tit. "Defences" pl. 3. 12. 15. 21; Litt. sect. 195; 1 Inst. 127. b.; Sty. 273; 1 Lutw. 5; and Cra. Jac. 82.* And these quotations were made by the latter: *Cliff's Entr. 15. pl. 37; Brewn's Rediv. 199, 200; Co. Lit. 127. b.; 9 Co. 37. b.; 1 Lev. 161; and 1 Keb. 865.*

(b) *Vide Ferrers v. Miller, Carth. 220.* cont. by three Judges against Holt Chief Justice.

(c) The same point was ruled in *Wheatley v. Cudmerston, M. 15 Geo. 2.* in the Common Pleas, and *Thompson v. Stockdale, H. 23 Geo. 3.* in the King's Bench. If the defendant plead a misnomer in abatement, he must take care not to admit himself to be the person sued. In *Roberts v. Robert Mann, 5 Durnf. and East 487.* The Court of K. B. overruled a plea in abatement of misnomer of the defendant, which began thus, "And the said Richard sued by the name of Robert &c."; because "by introducing the word *said* he admitted himself to be the person sued."

for

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MAWMAN,

for there the defendant introduced his plea of outlawry with a defendit vim et injuriam quando &c;" and upon a demurrer a respondeas ouster was awarded. And the case in *Stiles* 273, which was cited for the plaintiff in this case, was likewise there cited as an authority for the judgment: but in that case there was no judgment given, but the matter was ordered to be spoken to again. And *Lutwyche* at the end of the case in his Reports seems to doubt its authority; for he says that there is a multitude of precedents to the contrary in all the books of pleadings; and he cites many precedents which are all in the same manner as the present. So we think, as *Lutwyche* himself did, that that case is not law.

In support of the second objection it was said that pleas in abatement ought to be more certain than others; and that we admit. It was said likewise that it is necessary for the defendant to set forth that the other executor administered; to which we likewise agree; for the case of *Swallow v. Emberson*, which was cited out of 1 *Lev.* 161. and 1 *Keb.* 865. and several other cases are express to that purpose (a). But we are of opinion that it is sufficiently set forth in this plea that the other executor *John Fearnley* administered; for rejecting the word "*where*," which ought to be rejected as nonsense and surplusage, the rest is sensible and intelligible enough, that "*John Fearnley* did administer several goods and chattels the said *Joseph Holdsworth's* at the time of his death.

We are therefore all of opinion that judgment must be for the defendant, and that the writ must be quashed."

(a) *Regulien v. Shaw*, 3 D. and 560. per *Grose J.*: S. P.

1737, 8.

WILLIAM LEGG on the Demise of JONATHAN SCOT Hil. 11 Geo. 2.
Sen' and Jus' against SAMUEL and EBENEZER BENION. Wednesday, Feb. 18.

THE opinion of the Court was thus delivered by Demise from A. to B. for twenty-one years, if both should so long live; but if either should die before the end of the said term, then the heirs executors &c. of the person so dying should give twelve months notice to quit &c.—Held that the lease could only be determined by twelve months' notice given by the representatives of the party dying before the end of the term, and consequently that such notice given by the lessor to the representatives of the lessee (who died during the term) did not determine it.—Where power is given to a party to determine a lease on giving a notice in writing, he cannot determine it by giving a parol notice.

Wilks, Lord Chief Justice. "Case made before Mr. J. Comyns at Oxford Summer Assizes 1736. It arose on a lease made between *Jonathan Scot* the elder and *John Benion* on the 1st of *October* 1730, by which *Jonathan* demised the premises in question to *John Benion* in these words "To hold the same unto the said *John Benion* his executors administrators and assigns from the feast of *Saint Michael the Archangel* next before the date thereof for and during and until the full end and term of twenty-one years from thence next ensuing and fully to be complete and ended, provided they the said *Jonathan Scot* and *John Benion* and both of them shall and do so long live; but in case either of them shall happen to depart this life before the expiration of the said term of twenty-one years, then and in such case the heirs executors administrators or assigns of such person so dying shall give twelve months' notice in writing of their quitting or surrendering up the said premises;" under the rent of 26*l.* 10*s.* a year, payable during the said term of twenty-one years so determinable as aforesaid.

John Benion entered, and died on the 29th of *April* 1733: *Ebenezer Benion* the defendant is his administrator, and *Samuel* is his undertenant. The lessors of the plaintiff gave twelve months' notice before the demise laid in the declaration to both the defendants to quit or surrender up the premises: but they insisted to hold the same; and neither they or either of them nor the heirs or assigns of the said *John Benion* ever gave any notice to quit or surrender up the premises.

The question (a) therefore is whether the lease be or be not determined?

(a) This case was argued in the *Michaelmas* Term preceding.

And

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It was a good lesson, and that no words in a deed
 are ever so well done as those which are put upon them, and
 which are taken most strongly

... according to the lease, for ... of the lessee, ... notice must be laid

[illegible]

out of the case. If therefore the lease be deemed to be determined, all the subsequent clause, after the words "if both of them shall so long live" must be rejected as superfluous: but I think that a reasonable sense may be put upon them.

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Lew
den. Boot
against
BENLOW.

There are two instances put;

1. In case both of them live to the end of the term, then it is undoubtedly to continue;

2. In case one of them die; and then I think it is to continue until the representatives of the person dying give twelve months' notice.

The words are "then the heirs executors administrators or assigns of such persons so dying shall give twelve months' notice in writing of their quitting &c;" which I think may be construed thus, "until the heirs executors &c of such person so dying shall give twelve months' notice &c." This seems to me to be the only reasonable sense that can be put on these words; that if the lessor die, his representatives may not turn out the lessee without due notice; and if the lessee die, that his representatives may not throw up the estate on the landlord without the like notice. This seems to me to be the intent of the parties. And this construction is supported by these words in the clause, "in case either of them die before the expiration of the term," which seems to suppose that the term might continue after the death of one of them: whereas if any other construction be put on the words, it must determine on the death of either of them. The word "their" at the latter end of the clause seems the only word in the clause that does not quite tally with this construction, and is not quite sense: but that (a), though not a very proper word, must be taken to mean the persons who are to quit and surrender the premises.

We are therefore of opinion that the lessors of the plaintiff have no right to recover; and that a nonsuit must be indorsed on the postea."

(a) The word "their" seems to have been introduced to apply to the event of there being more than one representative of either the lessor or lessee.

1737, 8.

Friday,
Feb. 2d.JOHN DAVIES *against* THOMAS POWELL and Six
Others.

Deer in an
inclosed
ground
may be dis-
trained for
rent.
8r G. Co.
146. 7 Mod.
249. o&ed.
8. C.

THE following opinion of the Court was thus given
by

Willes, Lord Chief Justice. "Trespass for breaking and entering the close of the plaintiff called *Cavertham Park*, containing six hundred acres of land, in the parish of *Cavertham* in the county of *Oxford*, for treading down the grass, and for chasing taking and carrying away diversas feras, videlicet, one hundred bucks one hundred does and sixty fawns of the value of 600*l.* of the said plaintiff inclusas et coarctatas in the said close of the said plaintiff: Damage 700*l.*

The defendants all join in the same plea; and as to the force and arms &c they plead not guilty: but as to the residue of the trespass they justify as servants of *Charles Lord Cadogan*; and set forth that the place where &c at the time when &c was and is a park inclosed and fenced with pales and rails, called and known by the name of *Cavertham Park* &c; and that the said Lord *Cadogan* was seised thereof and also of a messuage &c in his demesne as of fee, and being so seized on the 3d of *August* 1730 by indenture demised the same to the plaintiff by the name (inter alia) of all the said park called *Cavertham Park* from *Lady-day* then last past for the term of seven years under the rent of 124*l.* 2*s.* The deer are not particularly demised, but there is a covenant that the plaintiff his executors and administrators should from time to time during the term keep the full number of one hundred living deer in and upon the said demised premises or in or upon some parts thereof. And Lord *Cadogan* covenants to allow the plaintiff in the winter yearly during the term twenty loads of boughs and lops of trees for browse for his deer to feed on, calling them there, as he does in other parts of the lease, "the deer of the said *John Davies*;" and likewise covenants that if the plaintiff shall on the feast of *St. Michael* next before the expiration thereof pay Lord *Cadogan* all the rent that would be due at the expiration

expiration of the lease, then the *plaintiff* his executors &c might sell or dispose of any or all of the deer that he or they should have in the said park at any time in the last year of the said term, any thing in the said indenture to the contrary in any wise notwithstanding. And the defendants justify taking the said deer as a distress for 186*l.* rent due at *St. Thomas-day* 1731; and say that they did seize chase and drive away the said deer in the declaration mentioned then and there found, "being the property of and belonging to the said *John Davies*" in the name of a distress for the said rent; and then set forth that they complied with the several requisites directed by the act concerning distresses, (and to which there is no objection taken;) that the deer were appraised at 16*l.* 15*s.* 6*d.*, and that they were afterwards sold for 86*l.* 19*s.* being the best price they could get for the same; and that the said sum was paid to Lord *Cadogan* towards satisfaction of the rent in arrear; and that in taking such distress they did as little damage as they could.

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DAVIES
against
POWELL.

To this plea the plaintiff demurs generally, and the defendants join in demurrer.

And the single question that was submitted to the judgment of the Court, is whether these deer under these circumstances, as they are set forth in the pleadings, were distrainable or not. It was insisted (a) for the plaintiff that they were not;

1st, Because they were *setæ naturæ*, and no one can have absolute property in them.

2dly, Because they are not chattels, but are to be considered as hereditaments and incident to the park.

3dly, Because, if not hereditaments, they were at least part of the thing demised.

4thly, Their last argument was drawn *ab inusitato*, because there is no instance in which deer have been adjudged to be distrainable.

First; to support the first objection, and which was principally relied on by the counsel for the plaintiff, they cited *Finch* 176; *Bro. Abr.* tit. "*Property*" pl. 20; *Keil-*

(a) This case was argued in *Michaelmas* 1737 by *Wright* Serjt. for the plaintiff and *Eyre* King's Serjt. for the defendants.

1737, 8. *way*, 30. *b. Co. Lit.* 47. *a.* 1 *Rel. Abr.* 666, and several other old books, wherein it is laid down as a rule that deer are not distrainable; and the case of *Mallocke v. Eastly*; 3 *Lev.* 227., where it was holden that trespass will not lie for deer, unless it appears that they are tame and reclaimed. They likewise cited 3 *Inst.* 109, 110., and 1 *Hawk. P. C.* 94., to prove that it is not felony to take away deer, conies &c, unless tame and reclaimed.

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against
POWELL.

I do admit that it is generally laid down as a rule in the old books that deer, conies &c, are *feræ naturæ*, and that they are not distrainable; and a man can only have a property in them *ratione loci*. And therefore in the case of swans, 7 *Co.* 15, 16, 17, 18, and in several other books there cited, it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares, rabbits, &c, he shall not say *suos*, because he has them only for his game and pleasure *ratione privilegii* whilst they are in his park, warren &c. But there are writs in the register, fo. 102. a book of the greatest authority, and several other places in that book which shew that this rule is not always adhered to. The writ in fo. 102. is "*quare clausum ipsius A. fregit et intravit, & cuniculos suos cepit.*"

The reason given for this opinion in the books why they are not distrainable is that a man can have no valuable property in them. But the rule is plainly too general; for the rule in *Co. Lit.* is extended to dogs; yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great damages have been recovered. Besides the nature of things is now very much altered, and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit: but now they are frequently kept in inclosed grounds which are not properly parks, and are kept principally for the sake of profit, and therefore must be considered as other cattle.

And that this is the case of the deer which are distrained in the present case is admitted in the pleadings. The plaintiff by bringing an action of trespass for them in some measure admits himself to have a property in them; and they are laid to be *inclosed*

claus et coarctatus in his close, which at least gave him a property *ratione loci* ; and they are laid to be taken and distrained there : but what follows makes it still stronger ; for in the demise set forth in the plea, and on which the question depends, they are several times called *the deer of John Davies the plaintiff*, and he is at liberty to dispose of them as his own before the expiration of the term on the condition there mentioned. And it is expressly said that the defendants distrained the deer being the property of the said *John Davies* : it is also plain that he had a valuable property in them, they having been sold for 86*l.* 19*s.* ; both which facts are admitted by the demurrer. The plaintiff therefore in this case is estopped to say either that he had no property in them or that his property was of no value. Besides it is expressly said in *Bro. Abr.* tit. "*Property*," *pl.* 44., and agreed in all the books, that if deer or any other things *feræ naturæ* become tame, a man may have a property in them. And if a man steal such deer, it is certainly felony, as is admitted in 3 *Inft.* 110. and *Hawk. P. C.* in the place before cited (*a*).

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against
POWELL.

Upon a supposition therefore, which I do not admit to be law now, that a man can have no property in any but tame deer, these must be taken to be tame deer, because it is admitted that the plaintiff had a property in them.

Secondly ; as to their not being chattels but hereditaments and incident to the park and so not distrainable, several cases were cited ; *Co. Lit.* 4*f.* *b.* and 7 *Co.* 17. *b.* ; where it is said that if the owner of a park die the deer

(*a*) The Legislature have also made provisions at different times for the protection of deer in forests and open as well as inclosed grounds. But by the stat. 16 *Geo.* 3. c. 30. all the former acts relating to this subject (except that of the 9 *Geo.* 1. c. 22.) are expressly repealed by name ; and it has been since holden by all the judges that that also, as far as it made it a capital offence to kill destroy or steal deer, was virtually repealed ; *R. v. Davies*, 1783. The stat. 16 *Geo.* 3. c. 30. inflicts a penalty of 3*0l.* on persons who kill wound or destroy, or take in any snare &c. or carry away any red or fallow deer in any forest chase purlicue or ancient walk, whether inclosed or not, or in any inclosed park paddock wood or other inclosed ground where deer are usually kept without the consent of the owner &c. or aid therein ; and a penalty of 2*0l.* on persons who course hunt shoot at or otherwise attempt to kill wound or destroy any such deer &c. or aid therein &c. ; and a double penalty on the keepers for either of those offences ; and it subjects the offender to transportation for seven years for a second offence.

E

shall

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shall go to his heir and not to his executors; and the statute of *Marlbridge*, 52 Hen. 3. c. 22., where it is said that no one shall distrain his tenants de libero tenemento suo nec de aliquibus ad liberum tenementum spectantibus. I do admit the rule that hereditaments or things annexed to the freehold (a) are not distrainable; and possibly in the case of a park, properly so called, which must be either by grant or prescription, the deer may in some measure be said to be incident to the park: but it does not appear that this is such a park, nay it must be taken not to be so. In the declaration it is styled *the close of the plaintiff*, called *Caversham Park*. In the plea indeed it is styled *a park*, called *Caversham Park*; but it is not said that it is a park either by grant or prescription; and it cannot be taken to be so on these pleadings, but must be taken to be a close where deer have been kept, and which therefore has obtained *the name of a park*, because the deer, as I mentioned before, are called *the deer of John Davies*, and because he is at liberty to sell them, and so to sever them from the park before the expiration of the term. And in *Hale's History of the Pleas of the Crown*, 1 vol. fo. 491., cited for the defendants, it is expressly said that there may be a *park in reputation*, "as if a man inclose a piece of ground and put deer in it, but that makes it not a park without a prescription time out of mind or the King's charter." Vid. stat. 21 Ed. 1. de malefactoribus in parcis there referred to.

Thirdly; as to the third objection that the deer are part of the thing demised, and consequently not distrainable; the only case which was cited to prove this was the case of tithes (b) which is nothing to the purpose; because where tithes only are let a man cannot reserve a rent, it being only a personal contract. Without denying the rule,

(a) Furnaces caldrons and the like fixed to the freehold, or the doors or windows of a house and the like, cannot be distrained." Co. Lit. 47. b. Bro. Abr. "Distress," pl. 23.—Neither can a lime kiln, if affixed to the freehold, be distrained. But where the plaintiff in replevin declared for taking his goods and chattels, to wit, a lime kiln; and the defendant avowed taking it as a distress for rent in arrear; and the plaintiff in his plea in bar said that the lime kiln was affixed to the freehold, it was holden, on demurrer, that the plea in bar was a departure from the declaration which asserted it to be a chattel; though, had it been a portable oven, it might have been distrained; and judgment was given for the defendant. *Niliott v. Smith*, 4 Durnf. & East 504.

(b) Vid. Bro. Abr. tit. "Distress," pl. 81; tit. "Dette," pl. 234; 1 Rob. Abr. 667; pl. 18; and Finch 135, 6.

which

which I believe is generally true, the fact here will not warrant it, for they are not part of the thing demised. They are not mentioned in the description of the particulars, and cannot be part of the thing demised for the reason before given, because they may be sold and disposed of by the plaintiff before the expiration of the demise.

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against
POWELL.

Fourthly; the last argument, drawn ab intus, though generally a very good one, does not hold in the present case. When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure, and not for profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses cows sheep or any other cattle. Whenever they are so and it is universally known, it would be ridiculous to say that when they are kept merely for profit they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied both in courts of law and equity, now that personal estates are so much increased and become so considerable a part of the property of this kingdom.

Therefore, without contradicting the reasons which are laid down concerning this matter in the ancient books, and without determining any thing with respect to deer in forests and chases or parks properly so called, concerning which we do not think it necessary to determine any thing at present, we are all of opinion that we are well warranted by the pleadings to determine that these deer, under the circumstances in which they appear to have been at the time when this distress was taken, were properly and legally distrained for the rent that was in arrear.

There must therefore be judgment for the defendants (s)."

(s) *Vid. Simpson v. Hartopp, M. 18 Geo. 2. p. 10.*

1737, 8.

Hil. 11 G. 2. JAMES COOPER *against* W. MONKE and Three Others.

Saturday,
Feb. 4th

[E. 10 GEO. II. Rol. 623, 4, 5.]

Replication
de injuriâ
suâ propriâ
absque tali
causâ is bad
where the
defendant
insists on a
right.

—When
defendant
(in an action
of trespass)
justifies in his
plea taking
the goods
as a distress
for rent, the
plaintiff in
his replication
must either admit
or deny the
rent in arrears;
replying de
injuriâ suâ
propriâ &c
is improper.

—Where
defendant
justifies (in
trespass for
taking the
plaintiff's
goods and
converting
them &c)
taking them
as a distress
for rent, the
taking and
converting
are considered
as the

THE opinion of the Court was now delivered as follows by

Willes, Lord Chief Justice. "Trespass for breaking and entering the house of the plaintiff in the parish of *St. Margaret's Westminster*, continuing there for the space of thirteen days, disturbing him in the quiet possession of his house, and taking and carrying away from thence and converting to their own use the several goods and chattels particularly mentioned in the declaration, of the value of 100*l*. And likewise for breaking and entering the shop of the plaintiff in the said parish, and expelling him from the possession thereof, and taking and detaining divers other goods and chattels therefrom and likewise particularly specified in the declaration, of the value of 20*l*. The damages are laid at 100*l*."

The defendants all join in the same plea: And as to the force and arms &c, and all the trespass (except entering the said house and shop and continuing in the said house for the space of thirteen days, and taking and detaining in the said shop carrying away and converting to their own use the said goods and chattels of the plaintiff in the declaration mentioned,) they plead not guilty.

And as to the entering of the said house and shop and continuing there thirteen days, and taking detaining in the said shop carrying away and converting to their own use the said goods and chattels, they insist on a special justification; and set forth in their plea that before the time when &c. the Dean and Chapter of *Westminster* were seized in fee in right of their church of two tenements, of which the locus in quo &c is parcel, and being so seized on the 6th of November 1728 demised the same by indenture to *Martha Peers* from the *Michaelmas* before for forty years; that *Martha* entered and was possessed, and on the 7th of December 1728 by indenture demised to the plaintiff the house and shop mentioned in the declaration (inter alia) from the

same thing; and therefore it is not inconsistent to plead a justification to the taking and converting all the goods, as a distress, and afterwards to say that he left part of them in the plaintiff's possession.

Michaelmas

Michaelmas before for eleven years under the rent of 6*l.* 17*s.* 6*d.* for the first three months, 55*l.* a-year afterwards for the next ten years, and 41*l.* 5*s.* for the last three quarters; that by virtue of the said demise the plaintiff entered and was possessed; and that, he continuing in possession, *Martha Peers* afterwards on the 20th of *October* 1729 married the defendant *W. Monke*; and the defendant *W. Monke* in his own right and in the right of the said *Martha*, and the other defendants as his servants and by the command of him and of the said *Martha*, justify the taking goods and chattels in the declaration as a distress for 82*l.* 6*s.*, the residue of 82*l.* 10*s.* for a year and a half rent due on the feast of *St. John the Baptist* 1736, the other 4*s.* having been paid before.

1737, 8.



COOPER
against
MONKE.

And they set forth their justification in this manner; that on the 26th day of *June* in the year last mentioned they entered into the house and shop &c in order to distress for the said rent, and then and there took the goods and chattels in the declaration mentioned, they being in the said house and shop, in the name of a distress for the said rent, and the goods and chattels so distrained they then impounded in the house and shop by the permission and with the consent of the plaintiff to prevent any damage that might happen by removing the same; and that the defendants continued in the said house thirteen days by causing one *A. Garner* to continue in the said house in which &c for thirteen days for the securing of the said goods so distrained, which said *A. Garner* so continued in the said house in which &c for thirteen days for the said cause by the permission with the consent and at the request of the plaintiff; and that the defendants afterwards on the 7th and 8th of *July* following did with the consent of the plaintiff publicly sell divers of the said goods to the best bidder at the best price which could be got for the same for the sum of 31*l.* 5*s.* 3*d.* and no more, which the defendant *Monke* received in part satisfaction of the rent so in arrear; and the rest of the said goods and chattels that remained unsold were at the desire and with the consent of the plaintiff left in the said house and shop in the possession of the plaintiff, and the same still remain in his possession, &c.

The plaintiff in his replication admits the lease from the Dean and Chapter to *Martha Peers*, and the lease from *Martha Peers* to the plaintiff, and that the house and shop

were

1737, 8. were part of the premises so demised, and for replication faith that the defendants at the said times when &c. of their own wrong without any such cause as is by them in their said plea above alleged did enter the said house and shop and did continue in the said house for the space of thirteen days, and ~~the~~ said goods and chattels found in the said house did take carry away and convert to their own use, and take and detain in the said shop the said goods and chattels found in the said shop in the manner and form &c.

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against
MONKE.

To this replication the defendants demur; and for causes of demurrer say, that the plaintiff by his replication hath not admitted that the rent in the plea mentioned to be in arrear was due, and for that the replication is multifarious, and several matters are offered to be put in issue, and no particular issue can be joined thereupon; and for that the replication is uncertain and wants form.

The plaintiff joins in demurrer.

Several objections were taken to this replication upon the first argument (a), and several cases were cited to support these objections.

The principal objections which were taken to the plaintiff's replication were that he had not admitted the rent in arrear, so would be at liberty to insist on an entry and eviction; and because this general replication that they did it of their own wrong without any such cause &c. is never admitted when the defendants insist on a right (b), as they plainly do in the present case, but is only admitted when the defendants insist on a matter of excuse, as that the plaintiff's fences are out of repair in an action of trespass with cattle, or son assault demesne in an action of assault and battery; and to support these objections were cited 8 Co. 67. a; *Yelv.* 157; *Cro. Jac.* 224, 225; *Chance v. Weeden*, *Salk.* 628; and *Wells v. Costerell*, 3 *Lev.* 48. And we were all clearly of opinion upon that argument that the replication was not good.

(a) This case was first argued in *Trinity* term 1737 by *Parker* King's Serjt. for the defendants and by *Bootle* Serjt. for the plaintiff; and again in the *Michaelmas* term following by *Eyre* King's Serjt. for the former and *Wright* Serjt. for the latter.

(b) See *Cockerill v. Armstrong*, *post.* *Tr.* 1738, and the cases there referred to; and *Bell v. Wardell*, *post.* *E.* 1740.

The Court being of that opinion, the counsel for the plaintiff took some objections to the defendant's plea, which was afterwards spoken to again, and which is the only matter that now remains for the judgment of the Court.

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COOPER
against
MONKE.

The objections to the plea were two ;

First, that the defendants pleaded a justification to the taking carrying away and converting to their own use all the goods and chattels in the declaration mentioned, and yet afterwards insist that they did not convert part of the said goods but left them in the possession of the plaintiff where they still are ; so the plea is inconsistent with itself ; for a man cannot admit that he has converted *all* the goods to his own use in the beginning of his plea, and afterwards insist that he has not converted *part* of them.

Secondly, that the justification does not go to all the goods. For they say that they sold divers of the goods and chattels for 3*l.* 5*s.* 3*d.* ; and then, instead of saying that *all the rest of the goods*, or the rest of the goods which were not sold for the said sum of 3*l.* 5*s.* 3*d.*, were at the desire and at the request of the said plaintiff left in the said house &c, they only say that "the rest of the said goods that remained unsold" generally ; so that for aught that appears by this plea there might be some goods sold without the consent of the plaintiff besides those which were sold with his consent for the sum of 3*l.* 5*s.* 3*d.* ; and if there were, as to those there is no justification.

Several cases were cited to make out these objections, and several cases cited in answer : but it is not material to mention any of them, because I think that the present case depends on a general rule of law, which was admitted on both sides, and upon the particular penning of this plea.

First ; as to the first objection : we are of opinion that this being an action of trespass, and not of trover, the taking away and converting are the same ; for every taking is a sufficient conversion to this purpose (a). And

(a) Vid. *Dye v. Leatherdale*, 3 *Wils.* 27 ; and *Fisherwood v. Cannon*, H. & G. 3. C. B. cited by Buller J. in *Taylor v. Cole*, 3 *Durnf. & East* 397.

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COOPER
vs
MONKE.

as the defendants have insisted in their plea that they took all the goods as a distress, we think that that is a sufficient conversion of the whole, though they were not removed out of the house and shop where they were; for the possession in point of law is changed by their being seized as a distress, and as it is said that they were all *impounded* in the house and shop, wherever they are impounded, they are considered as in the possession of the distrainor. We think therefore that this objection to the plea is of no weight.

Secondly; as to the second; it was admitted on both sides that it is sufficient if a plea be certain to a common intent. And we think that this plea is certain to a common intent; nay, that it would be departing from the natural and obvious sense of the words to construe them so as to make it bad. For when it says "the rest of the goods," that implies that all were not before sold with the consent of the plaintiff; and the words which follow are only an unnecessary description of these goods.

If the words had been only "the goods which remained unsold," there would have been some colour for this objection. But we think that the word "rest" excludes any such construction as is contended for on the part of the plaintiff.

But if there could be any doubt of this matter, and that in fact there were some goods which were sold without the consent of the plaintiff, we are of opinion that the plaintiff ought to have insisted on it in his replication, which he has not done.

As therefore we were all of opinion before that the replication was not good, and as we are of opinion now that the plea is good, notwithstanding the objections which have been taken by the plaintiff, judgment must be for the defendants."

JAMES FAWCETT *against* THOMAS STRICKLAND
and Nine Others.

1737. 8.
Hil. 14 G. 2.
Monday,
Feb. 6th.

[E. 10 Geo. 2. Rol. 383, 384.]

THE following opinion of the Court was now given by Com. Rep. 577. S. C.
Willes, Lord Chief Justice. “Trespas for driving and chasing with dogs seventy sheep, two mares, one gelding, and four cows, of the plaintiff, and for setting on and inciting the said dogs to bite the said cattle, at the parish of *Sedbergh*, whereby forty of the said sheep died, and ten of the said sheep and two mares and one gelding were driven to places unknown and lost, and the rest of the said cattle were hurt and greatly damnified.” The lord of a manor may inclose part of a common against tenants having common of pasture, notwithstanding they have also a common of turbary, if he leave sufficient common of pasture.

It is likewise laid another way, for driving and chasing with dogs the same cattle in a place called *Blewcafter Common*, in the said parish of *Sedbergh*, whereby they were greatly hurt and damnified. Damage 40*l*. —And if the trespass for driving away a commoner's cattle from the common, the lord in his plea justifies under an approvement of the common, alleging that he left sufficient common of pasture for his tenants, and the plaintiff replies that he was also entitled to common of turbary, that therefore the lord wrongfully inclosed &c, and that he (the plaintiff) put in his cattle to enjoy his common of pasture; and the defendant demurs, it will be taken that the lord did leave sufficient common of pasture; and on these pleadings the defendant is entitled to judgment.

The defendants all join in the same plea; and as to the force and arms and all the trespasss, except the driving and chasing the said cattle with dogs in the declaration first mentioned, they plead not guilty; and as to that they insist on a special justification, and set forth that *Thomas Strickland* the defendant at the time when &c was seized in his demesne as of fee of and in the manor of *Sedbergh*, within which said manor there are and at the said times when &c and also time immemorial there have been several large wastes or commons lying contiguous one to another without any separation, and parcel of the said manor, containing together 10,000 acres and more; and that the said *Thomas Strickland* being so seized of the said manor before the said time when &c did inclose 700 acres of a certain waste or common there called *Blewcafter Common*, being one of the said wastes or commons abovementioned and parcel of the said manor, with a wall and strong fence from the residue of the said wastes or commons, to hold But if the lord in exercising his right of approving injure the right of common of turbary, the person whose right is so injured may have an action against the lord.

to

1737, 8. to himself in severalty and to his own use, and did ap
 the same, there being then left by the said *Thomas S*
 land and remaining in the residue of the said wast
 commons not inclosed sufficient common or pasture
 the commonable cattle of all the tenants of the said *T*
Strickland of the said manor and of all other persons
 ing common of pasture in the said wastes or comu
 together with free ingress egress &c; by virtue wh
 and of the statute the said *Thomas Strickland* at the
 when &c was seised of and in the said 700 acres s
 closed in his demesne as of fee; and the said *T*
Strickland and the other defendants as his servants an
 his command justify driving and chasing the plain
 said cattle as being damage feasant in the said 700 aci
 inclosed.

FAWCETT
 against
 STRICK-
 LAND.

The plaintiff replies that at the times when &c he
 seised in his demesne as of fee of and in a certain mess
 and forty acres of land called *Backside* in the said pari
Sedbergh; and that he and all those whose estate he
 from time immemorial have had and used and were ac
 tomed to have common of pasture in the said waste c
Blewcafter Common for all his and their commonable
 levant and couchant on the said tenements every ye
 all times of the year as appurtenant thereto; and
 likewise he and all those whose estate he hath for time
 memorial have had and used and were accustomed to
 common of turbary in the said waste for his and their
 cessary fuel to be burned and consumed in the said mess
 every year at all times of the year as occasion requ
 as appurtenant to the said messuage; and that the
Thomas Strickland inclosed 700 acres of the said
 called *Blewcafter Common* and approved the same un
 fully and contrary to the statute; and that the pla
 being so seised of the said messuage and tenement &c
 the said inclosure at the times when &c put the said c
 being his own and levant and couchant on his said mess
 and tenement with the appurtenances into that part of
 said waste so inclosed to eat up the grass there grow
 and to use his said common of pasture, and that the
 tendants of their own wrong chased the cattle as a
 said whilst they were so doing.

To this replication the defendants demur; and for causes of demurrer say that the replication is double, for that two distinct and different matters, viz. the prescription of the right of common and the prescription of the right of turbary are insisted on in the replication, whereas one of those matters only ought to have been pleaded and insisted on; and for that the plaintiff in his replication hath not admitted or denied the sufficiency of the common of pasture in the residue of the said commons with free ingress egress &c; nor hath the plaintiff traversed or denied any other part of the plea of the said defendants; and for that the said replication is uncertain, insufficient, argumentative, and informal.

1737. 8.

FAWCETT
against
STRICK-
LAND.

The plaintiff joins in demurrer (a).

If there were no other objections to the replication than those which are particularly assigned as causes of demurrer, we are inclined to be of opinion that the replication is good. For we think that it was proper and necessary for the plaintiff to insist on his common of turbary in order to avoid the defendant's, *Strickland's*, approvement, and it was necessary for him to insist on his common of pasture in order to justify putting in his cattle. And we think that, by his not denying the sufficiency of the common of pasture in the residue of the said commons and the other matters insisted on by the defendants in their plea, he hath sufficiently admitted them.

But there is no occasion to give any positive opinion on these matters, because we are clearly of opinion that the replication is bad in substance, and that what the plaintiff has insisted on in bar to the defendants, *Strickland's*, right, which is set forth in the plea, is not a sufficient answer.

There was another objection taken by the counsel for the defendants, which is not mentioned as a cause of demurrer, and which it may be proper just to take notice of in order to lay it out of the case. The objection was

(a) This case was twice argued, by *Boyle* and *Burnett* Serjeants for the defendants and by *Eyre* and *Parker* King's Serjeants for the plaintiff; the second argument was in *Michaëlas* Term 11 Geo. 2.

that

HILARY TERM, 11 Geo. II. C. P.

3737. 8. that the plaintiff does not set forth in his replication that he had a right to take common of turbary in that part which was inclosed, as it was necessary for him to do; for the common of turbary does not extend throughout the whole common as common of pasture does, but is confined on to such places where turves may be got. And for the purpose were cited 2 *Inst.* 412; 1 *Rol. Abr.* 399; 1 *Le* 231; *Hayward v. Cunningham*, *Fitz. N. B.* 123; I have looked into the cases, which are very little to the purpose and do by no means warrant the objection. But I believe the precedents have been both ways.

FARWELL
vs.
STRICK-
LAND.

However the plaintiff in this case lays his right common of turbary in *Blewcafter Common* generally, which must be taken to mean the whole common; and a man may certainly have a right of common of turbary throughout the whole common as well as common of pasture though he cannot enjoy his right of common of turbary in those parts of the common where there are no turves any more than he can enjoy his common of pasture those parts of the common where there is no grass.

We think therefore that there is no great weight in the objection,

But what the Court goes upon is that this is an action brought by the plaintiff for chasing and driving away the cattle put into the defendant's, *Strickland's*, inclosure use and enjoy common of pasture; and therefore we think that, considering the nature of the plaintiff's action and the wrong which he complains of therein, the common of turbary is quite out of the case.

For though a lord cannot by virtue of the statute *Merton*, 20 *Hen. 3. c. 4.* inclose and approve again common of turbary, and so it is expressly laid down *Lord Coke* in 2 *Inst.* 87. in his comment on this statute which we admit to be good law, yet we are of opinion that where there is common of pasture and common of turbary in the same waste the common of turbary will not hinder the lord from inclosing against the common of pasture, for they are two distinct rights.

Supposing one man has common of pasture and another has common of turbary in the same waste, he that

has common of pasture cannot justify throwing down the lord's inclosure, provided there be sufficient common of pasture left, because another person has common of turbary in the same common. And wherever rights are in their nature distinct, as common of pasture and common of turbary certainly are, we think it will be just the same though they happen to concur in one and the same person, as they do in the present case.

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STRICK-
LAND.

If it were otherwise, it would be just the same in common of piscary and common of estovers, for Lord Coke says that the statute does not extend to either of them. And yet it would seem to be absurd to say that a lord cannot enclose against common of pasture, because his tenants or some other persons have common of piscary or common of estovers in the same waste; whereas his inclosure may be no interruption to their enjoyment of their common of piscary or estovers, nay probably their common of estovers may be better for such inclosure.

If indeed by such inclosure their common of piscary or their common of estovers were affected, or they were interrupted in the enjoyment of either of these rights, they might certainly bring their action, and the lord (to be sure) in such case could not justify such inclosure in prejudice of these rights. And so may the plaintiff in the present case, if he be interrupted in the enjoyment of his common of turbary: but by his present action he does not complain of any such interruption, nor does he insist upon any such matter in his replication.

As therefore his only complaint is of an interruption of his common of pasture, and as by the statute of *Merton* the defendant, *Strickland*, might certainly enclose part of the common notwithstanding the plaintiff's common of pasture, if he has left sufficient common of pasture, which in the present case is admitted by the pleadings, we are of opinion that the right of common of turbary insisted upon by the plaintiff in his replication is no answer to the defendants' plea; that therefore the replication is bad in substance; and that judgment, so far as the demurrer goes, must be for the defendants (a)."

(a) The case of *Shakepear v. Peppin*, 6 Durnf. & East, 741. received a similar determination on the authority of this case.

1737, 8. The following private note was added in Lord Chief Justice *Willes's* note-book, from which the above judgment was taken ;

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“ *Note.* It was said in this case that an assize of turbary, piscary &c, did not lie at common law before the statute 13 *Ed. 1. 2 Westm. c. 25* ; and that therefore there is no such writ in the register for any common but common of pasture ; and for this purpose was cited *Webb's* case, 8 *Co. 48* : But *Bracton, lib. 4. f. 231.* was cited to the contrary (a). However this be, I did not think that it was at all material in the present case, and have therefore taken no notice of it in my judgment.”

(a) And *Ld. Coke, 2 Inst. 412.*, mentions an instance of an assize for a common of piscary in the reign of *Hen. 3.*, before the making of the stat. 13 *Edw. 1.* ; but then he adds “ yet because (as hath been said) there was no writ in the Register in those cases, therefore before this act no writ did lie by the general opinion of the Judges ; but now this act hath cleared the question.”

H. 11 G. 2.
Tuesday,
Feb. 7th.

JOHN CANDLER *against* JOHN FULLER.

Arbitrators cannot award the costs of reference, unless power is expressly given to them for that purpose.

—But if in such a case they award the plaintiff his costs of suit and charges of arbitration to be taxed by the proper officer, and the officer only tax the former, the award will be good for the former and bad as to the latter.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. “ Debt on bond entered into by the defendant to the plaintiff on the 21st of *July* 1733 in the sum of 100*l.*

The defendant prays over of the condition, which is to stand to the award of *Thomas Scotchmer* and *John Ling*, to whom all matters in difference between the parties were submitted, so as their award was made in writing under their hands ready to be delivered to the parties on or before the 20th of *August* next, if not, then to stand to the award of such person as the arbitrators should choose for an umpire, so as he made his award under his hand on or before the 27th of *August* next. And the defendant pleads that the arbitrators on the 17th of *August* 1733 made their award in writing under their hands and seals of and concerning the premises ; and that they awarded that the de-

—An award may be good in part and bad in part.

—If arbitrators award the defendant to pay the plaintiff his costs of suit to be taxed by the proper officer before a particular day, it is the business of the defendant to have them taxed before that day.

defendant

defendant his heirs executors and administrators should upon the 1st day of *September* next ensuing pay or cause to be paid unto the plaintiff the full sum of 8s. "with his costs of suit *and charges on that their arbitration* as the same should be taxed by the prothonotary of his Majesty's Court of Common Pleas at *Westminster* wherein the suit was depending, or as the parties within themselves should agree;" and that the plaintiff and the defendant after such payment should deliver to each other general releases of all matters to the 21st of *July* 1733; and the defendant avers that on the said 1st of *September* he tendered to the plaintiff 8s. and also a general release according to the award duly stamped and executed by him. And further pleads that he had no notice of the plaintiff's costs of suit mentioned in the said award or of his charges of the said award at any time before or upon the said 1st of *September*, and that the prothonotary of his Majesty's Court of Common Pleas at *Westminster* did not tax the plaintiff's costs of suit and charges on the said arbitration at any time on or before the said 1st day of *September*; and that no agreement was made between the plaintiff and the defendant at any time before or upon the said 1st day of *September* for ascertaining how much should be paid by the defendant to the plaintiff for his said costs or for his charges of the said arbitration, nor of or concerning the said costs or charges or either of them in any respect whatsoever.

1737; 8.

CANDLER
against
FULLER.

The plaintiff replies that after the making of the said award and before the suing out of the said original writ, to wit, on the 11th day of *December* in the year of our Lord 1736 the plaintiff's costs of suit in the said award mentioned were duly taxed by Mr. Prothonotary *Thompson* at the sum of 10l. 3s. 2d., of which the defendant the same day and year had notice and was then and there requested to pay him the said sum of 10l. 3s. 2d., which the defendant hath not yet paid, but hath refused to pay the same.

The defendant demurs generally, and the plaintiff joins in demurrer.

The defendant's objection to the plaintiff's replication was that the costs of the award were to be taxed before the

1737, 8. the 1st of September 1733, because they were to be paid on that day; and that it was incumbent on the plaintiff, who was to receive them, to get them taxed before that time, otherwise it was impossible for the defendant to pay them, and that his getting them taxed on the 11th of December 1736, which the plaintiff insists on in his replication, is entirely immaterial, the defendant not being obliged to pay them by the award, unless they were taxed before the said 1st day of September.

CANDLER
against
FELLER.

Several objections were likewise taken to the award; as that it does not appear in what suit the costs were awarded; that there was not time enough for the prothonotary to tax them between the date of the award and the time of payment; and that the arbitrators have awarded the costs of the arbitration, which they had no power to do.

To support this last objection several cases were cited: but I need not particularly take notice of them, because it is undoubtedly true that the arbitrator cannot award costs of the arbitration (a), it being a matter not submitted to them as arising subsequent to the time of submission. *Yelv.* 98. *Moor pl.* 489. *Cro. Eliz.* 432. 2 *Ventr.* 242. and *Plowd.* 396. cited to this purpose.

But then the answer is plain, that an award may be good in part and bad in part, that is bad as to the matters that are not within the submission and good as to the rest, provided they are entire and distinct and do not at all depend upon the matters awarded which are not within the jurisdiction; and so it is expressly held in *Yelv.* 98. *Martham v. Femx*; *Cro. Eliz.* 432. *Samon v. Pitt*; and in several cases that are mentioned in 1 *Rol. Abr.* 258 & 259 (b). The costs of the suit in the

(a) But if a cause be referred, the arbitrators may award the costs of the cause to be paid by either of the parties without any express authority for that purpose. *Roe d. Wood v. Doe*, 2 *Durnf. & East*, 644.—Where the arbitrator awarded the defendant to pay the plaintiff a certain sum “and the costs sustained by him in the said action, to be taxed by the proper officer”, it was holden that the award did not include the costs of the reference. *Browne v. Marsden*, 1 *H. Bl. Rep. C. B.* 223. See also *Bradley v. Turfrow*, *Bos. & Pull. Rep. C. B.* 34.

(b) See also *Faulore v. Tribb*, 1 *Rol. Rep.* 437; *Norton v. Lahins*, *Wineb.* 1; *Pinkney v. Bullock*, 2 *Lev.* 3.; *Bargrave v. Atkins*, 3 *Lev.* 413; *Simon v. Gavil*, *Salk.* 74; and *Pickering v. Watson*, 2 *Bl. Rep.* 1117.

present

present case are certainly distinct from the charges of the arbitration; and therefore the award may be good for the costs of suit, and bad for the charges of arbitration, as it undoubtedly is in the present case.

1737, 8.

CANDLER
against
FULLER

As to the objection that it is uncertain *what suit* is meant, we are of opinion that the award is certain enough. It is described a suit in this court; it must be taken to be between the parties; and we cannot suppose (no such thing appearing in the pleadings) that there was more than one suit depending: Nor can we suppose that between the 17th of *August* and the 1st of *September* there would not be time enough for the prothonotary to tax the costs.

In answer to the objection to the replication, the plaintiff took an objection to the plea, for that the defendant had not said that the prothonotary had not taxed the costs of suit and the charges of arbitration before the 1st of *September*, which might be true if he had not taxed the charges of arbitration though he had taxed the costs, which would be sufficient, the award being void as to the charges of the arbitration.

To this as well as to the defendant's objection to the replication several answers were given, which I need not take notice of, because we are all of opinion that there is another fatal objection to the plea:

For we are of opinion that it was incumbent on the *defendant*, who was awarded to pay the plaintiff his costs of suit, to procure them to be taxed by the prothonotary. As in case a man be awarded to convey an estate to another person by such a time, he is to procure the conveyances to be made. Or, to bring it nearer to the present case, if a man be awarded to convey an estate to another by such conveyances as shall be approved of by such a counsel, he is certainly to prepare the conveyances and to procure them to be approved of by that counsel.

F

We

1737, 8 We therefore being of this opinion, the objection to the replication is out of the case, and judgment must be for the plaintiff(a)."

CANDLER
against
FULLER.

(a) Vid. *Storke v. De Smeth*, *infra*.

Tuesday,
Feb. 7th.

ROWNDELL *against* POWELL.

Judgment entered up on a warrant against defendant in *Jamaica*, on an affidavit that he was alive four months ago. Sr. G. Co. 145. Barnes 256. S. C.

" MOTION to enter up a judgment on a warrant of attorney. It appeared by the affidavit that the defendant was in *Jamaica*; and the affidavit was made by a person who came from thence in *September* last and arrived here about the middle of *January*, and he swore that the defendant was alive and well at *Jamaica* on the 12th of *September* last.

The Court doubted a little at first: but on consideration they granted the motion; for they thought that, considering the distance of the place, here was as good evidence of the defendant's being alive as the nature of the thing would admit of; that this was a matter left to the discretion of the Court; and that it would be a very serious consequence if the Court would not suffer a judgment to be entered up if the defendant were gone abroad."

H. II G. 2. SAMUEL STORKE *against* CONRAD DE SMETH;
Friday
Feb. 17th. In Error. In the *Exchequer-Chamber*

[E. 8 Geo. 2. Rol. 415.]

THIS was an action of debt on a bond, dated 26 April 7 Geo. 2. in 2500*l*.
An award may be good in part and bad in part, provided the latter be independent of and unconnected with the former.—But if the arbitrators award A. to pay B. 100*l*, and award A. and B. to give general releases to each other, and then award B. to pay A. 20*l*. at a subsequent time, the whole award is bad.
The defendant prayed oyer of the condition, which was that one *Philip W. Hingens* should stand to the award of *R. Drake J. Lloyd* and *J. Paice* of all matters in difference between *Hingens* and the plaintiff, so as they
[—] If the arbitrators award A. to pay B. 30*l*. on the 1st of January, and B. to pay A. 10*l*. on the 1st of February; the whole is bad.

OT

if any two of them made their award before the 1st of January then next; and then pleaded that the arbitrators made no award.

1737.8

STORKE
against
DR SMITH.

The plaintiff in his replication set forth an award made by two of the arbitrators on the 31st of December 1734; in which the arbitrators awarded that *Hingens* on the 1st of March then next should pay to *Storke* (the plaintiff) 1496*l.* 5*s.* 8*d.*, and should execute and deliver to the plaintiff a general release of all claims &c. except such claims and demands as *Hingens* might have on him by reason or on account of one-fourth part of the proceeds of 113 casks of juniper-berries; and that thereupon the plaintiff should deliver up to *Hingens* two bills of exchange the one for 1000 dollars the other for 802 dollars, drawn on the 20th of November 1733 by *Hingens* on the plaintiff payable to the order of *J. Harniman* and accepted and paid by the plaintiff; and that the plaintiff should also deliver to *Hingens* an order in writing, ordering *Raguenau* and Co. to pay 987 dollars to *Hingens*, being the produce of 5 bales of damaged cloth consigned by the plaintiff to *Hingens* and by him delivered to *Raguenau* and Co.; and that the plaintiff, on the receipt of the 1496*l.* 5*s.* 8*d.* and of the general release by *Hingens*, should execute a general release to *Hingens* of all claims &c. except such claims as the plaintiff had or might have on him by reason or on account of 52126 pounds of fish thereafter particularly mentioned; and that the plaintiff should on or before the 1st of March then next pay two bills of exchange drawn by *Hingens* on the plaintiff, both dated the 25th of Dec. 1733, the one for 550 dollars and the other for 450 dollars, payable to the order of *Hingens* and accepted by the plaintiff. The award then recited that *Hingens* had consigned to the plaintiff 40 casks of juniper-berries, wherein *Hingens* was concerned one-fourth part, and had also consigned to the plaintiff 113 casks more of juniper-berries on account of the plaintiff as to three-fourth parts and on the account of *Hingens* as to the other fourth part; and the arbitrators declared that in making their award they had given *Hingens* credit for his part of the proceeds of the 40 casks of juniper-berries and also for three fourth parts of the prime costs and charges of the 113 casks, but as to the proceeds of the one-fourth part of the 113 casks belonging to *Hingens* they had taken no notice thereof in their award,

HILARY TERM, 11 GEO. II. Cam. Scac.

the sales thereof not being finished before the said 26th of April then last: The award also recited that the plaintiff had consigned to *Hingens* a cargo of fish on the plaintiff's account, and that *Hingens* had consigned 52126 pounds thereof to *R. Ricca* who had not rendered any account of the sales thereof; and that *Hingens* had consigned to the plaintiff seven casks of white argol which had been consigned to him by *Ricca*, and which had been sold by the plaintiff for 29*l.* 15*s.* 7*d.*; and then the arbitrators awarded that the plaintiff should retain and keep the said 29*l.* 15*s.* 7*d.* towards payment and satisfaction of the proceeds of the fish, and that *Hingens* should account for the proceeds of the fish which should come to his hands over and above the 29*l.* 15*s.* 7*d.* to and with the plaintiff, and pay the same to him when he (*Hingens*) should receive the same, and not otherwise: but if *Hingens* should on or before the said 1st of March then next make it appear by due proof that he had before the 26th of April then last accounted with *Ricca* for the net proceeds of the argol, then the plaintiff should within one month after such proof pay to *Hingens* the said 29*l.* 15*s.* 7*d.*—The plaintiff, after thus setting out the award, assigned for a breach that *Hingens* had not paid 1496*l.* 5*s.* 8*d.* which was directed by the award to be paid to him on the 1st of March ensuing the date of the award.

To this replication the defendant demurred generally; and the plaintiff joined in demurrer; and the Court of King's Bench gave judgment for the defendant.

The record was then removed into the *Exchequer Chamber* by writ of error; where after an argument by *Birch* Serjeant for the plaintiff in error, and *Parl* King's Serjeant for the defendant, that judgment was confirmed, the opinion of the Judges of the Court Common Pleas and of the Barons of the Exchequer being thus given by

WILLKS, Lord Ch. Just. C. B.—“We are of opinion that this is a most uncertain inconsistent and contradictory award. The whole is so, but I shall only mention two or three objections.

1st, A general release is directed to be given by *Hingens* on the first of March of all demands whatso-

except a demand of juniper-berries, and yet it is afterwards directed that the plaintiff is to account with and give to *P. W. Hingens* 29*l.* 15*s.* 7*d.* being money which he received on his account for white argol; so that he is directed to release this demand and afterwards to pay it. 1737, 8. *STORKE against DE SMITH.*

2dly, *P. W. Hingens* is directed to pay 149*l.* 5*s.* 8*d.* on the 1st of *March*, even though it is admitted that the plaintiff has at that time of his in his hands 29*l.* 15*s.* 7*d.*, and that *P. W. Hingens* is not to deduct it, but is directed to pay it to him at a time subsequent.

3dly, The manner likewise, in which this 29*l.* 15*s.* 7*d.* is directed to be paid or retained by the plaintiff, is quite inconsistent with common sense(a).

It was indeed objected by the counsel for the plaintiff that an award may be good in part, and bad as to the other parts, and that this award was good as to the payment of 149*l.* 5*s.* 8*d.*, though bad in other parts of it; which was admitted on the other side to be true where one part of the award is entire and not dependent on the rest (b): but in this case the payment of this sum, in which the breach is assigned, is not independent of the rest. For the release which is certainly bad, was directed to be given at the same time by *P. W. Hingens*; and the 29*l.* 15*s.* 7*d.*, which is admitted to be in the plaintiff's hands, ought in justice to have been deducted out of the 149*l.* 5*s.* 8*d.*

We are therefore of opinion that the award is bad even in that part in which the breach is assigned, and that the judgment ought to be affirmed."

(a) The award with regard to the proceeds of the fish is not final, and therefore bad; vid. *Padley v. Goddard*, 7 *Durnf. & East*, 73, and the cases there cited.

(b) Vid. *Candler v. Fuller*, *sup.* 62. and the cases there cited.

1738.

E. 11 G. 2.
Friday,
May 5th.Trover for
"old iron"
good after
verdict.
Prac. Reg.
412. & C.JOHN TALBOTT *against* THOMAS SPEAR.

“TROVER for several goods, to wit, one waggon, one bed and bedstead, two bushels of horse beans, one barrel of small beer, and “old iron;” to the value of 12*l*. The general issue pleaded, and verdict for the plaintiff.”

It had been moved (a) in arrest of judgment that “old iron” was too uncertain :

But *per Curiam*. We will not arrest judgment for this reason. We cannot see how it could have been made more certain. If it had been *some old iron*, it had been equally uncertain, and yet *quandam parcellam filii* has been holden good. The only way that it can be made more certain in the case of *old iron* would be to say “so many pounds of old iron;” and yet the plaintiff would not be obliged to prove that quantity at the trial. So we do not see how this would at all help the defendant, or give him more light than as it is.

Besides these words are either certain and intelligible, or were made so by the evidence at the trial, or not. If they be certain and intelligible, or were made so by the evidence, then the objection vanishes : if they were not made so at the trial, but remained uncertain and insensible, then the jury could give no damages for them ; and consequently for this reason the judgment ought not to be set aside ; and of this opinion were both the Courts of C. B. and B. R. in *James Osborn’s* case 1*Q* Co. 130.

We are therefore of opinion that judgment ought not to be arrested for this reason, and that the rule nisi must be discharged (b). ”

(a) It appears that this case was twice argued.

(b) Whatever degree of precision was formerly required in describing goods in a declaration in trover, as appears by *Grammel v. Rboltham*, *Cre. Eliz.* 865, and in several of the ancient reports, in later times a greater latitude has been indulged in the action of trover than in detinue or replevin where the goods themselves are to be recovered or returned. *Graves v. Drake*, *Sty.* 199 ; 2 *Sid.* 175, *Emery’s* case cited in 1 *Vent.* 114 ; *Chamberlain v. Cooke*, 2 *Ventr.* 78 ; *West v. Davies*, 1 *Lev.* 301 ; *Jenny v. Norris*, *ib.* 303 ; *White v. Graham*, 2 *Str.* 827 ; *Radley v. Rudge*, *ib.* 738 ; *Hastgrave v. Thompson*, cited in 2 *Str.* 810. *Errisford v. Bottomley*, 2 *Ld. Raym.* 1529, and 2 *Str.* 809 ; and *Hobbs v. Greaves*, *Barnes* 276.

1738,

SIR JOHN CHICHESTER *against* CHRISTOPHER LETHBRIDGE.

E. 11 G. 2.
Friday,
May 5th.

THE following opinion of the Court was delivered by

A general way and a private way by prescription are inconsistent, and cannot be claimed together.

—Prescription for a right of way for A. and others (not naming them) is uncertain, and bad even after verdict.

—A claim of a way of necessity from A. to B. for all persons is good,

—A prescriptive right of way for coaches &c. is good after verdict.

—An action will not lie by an individual for an obstruction in a public highway unless he sustain a particular damage, which must appear on the record: but if the

Willes, Lord Chief Justice. “ This is an action on the case for obstructing a way; there are two counts. The first sets forth that the plaintiff was seised in fee of an ancient messuage in *Sherwell* near to the ancient town of *Barnstaple*, and that time out of mind the only way for persons travelling in coaches and chariots from the said capital messuage to *Barnstaple* aforesaid was in and through the several closes of the defendant (naming them) and so back again, every year and at all times of the year; and that he the said Sir *John Chichester* and all those whose estate he had and now hath in the said messuage with the appurtenances time out of mind have had and used and have been accustomed and of right ought to have and use the said way for himself and themselves and others travelling in coaches or chariots from the said messuage to *Barnstaple* in and through the said closes and so back again the same way every year at all times of the year as belonging to the said messuage; and then he lays an obstruction by the defendant.

The second count sets forth that time out of mind there hath been and is a certain common highway of necessity for all the liege subjects of our lord the now King and his progenitors &c. travelling in coaches and chariots from *Sherwell* aforesaid to *Barnstaple* aforesaid in through and over the said several closes of the defendant, and so back again every year at all times of the year at their will and pleasure; and then the plaintiff sets forth that on the 26th of *November* 1736 and at divers other times between that day and the 30th of *January* in the said year he was travelling in his coach from *Sherwell* aforesaid to *Barnstaple* aforesaid and from thence back again in the said way in through and over the said close of the defendant, called the *Moggeridge*, as it was lawful for him to do, but the defendant to deprive him of the said way &c. did then and there

plaintiff state that the defendant obstructed &c. by a ditch and gate across the road, by which the plaintiff was obliged to go a longer and a more difficult way, and that the defendant opposed him in attempting to remove the nuisance; this is a sufficient damage to support the action.

stop

1738. stop up and obstruct the said way by erecting fastening and locking gates bars and posts and digging trenches across the said way, and in his proper person withstanding and opposing the plaintiff from removing and abating the said obstructions, so that he the said plaintiff then and hitherto could not and cannot have or use the said way as he ought; but saith that he is damnified 40*l*.

CHICHESTER
TER
against
LETH-
BRIDGE.

The defendant pleads the general issue not guilty. Verdict for the plaintiff and several damages, viz. 1*l*. on each count,

Motion (a) in arrest of judgment, and several objections taken.

To the first count; 1st, that it sets forth a general way and a private particular way by prescription; which two rights are inconsistent.

2dly, That the plaintiff sets forth a right for himself and others (naming no persons) to go that way, which is too general, and not certain enough in a prescription, as was held in the case of *Underwood and Saunders*, 2 *Lev.* 178, where a man prescribed for himself and quibusdam aliis tenentibus, which was holden to be uncertain and not good.

And we are of opinion that by reason of these objections the first count is not good.

The objections to the second count were:

1st, That there can be no such thing as a way of necessity, and that such a right was never laid before.

2dly, That there cannot be a prescriptive right for coaches and chariots time out of mind, because coaches and chariots are of modern invention, and have not been in use here time out of mind.

3dly, That no particular damages are laid, which ought to be in the case of a public highway, (as this is laid to be,) otherwise an action will not lie.

As to the two first objections; we are of opinion that there may be a way of necessity (b): for if there be but one

(a) The motion was made in *Michaelmas* term 1737; and the case was argued in *Hilary* term following.

(b) Vid. *Clark v. Cogge*, *Cro. Jac.* 170; *Dutton v. Taylor*, 2 *Lutes.* 1489; *Parker v. Welford*; 2 *Sid* 39; and *Staple v. Heydon*, 6 *Mod.* 34; and an anonymous case, *ib.* 149. Where one grants land to another to which there is no access but over the land of the grantor, the grantee has a right of way over the grantor's land, as a way of necessity. *Howston v. Frearson*, 8 *D. & E.* 50. So if the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the way

one road to a place and no other way of going, that is a way of necessity. We are of opinion that the jury having found this, which is a matter of fact, and likewise found that there has been a way for coaches and chariots time out of mind, which is also a matter of fact, we cannot take notice judicially whether there have been coaches and chariots time out of mind or not, but must take it to be as the jury have found it.

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And as to the third objection; we admit the general rule, but think that in this case there are particular damages assigned sufficient to support this action. The rule is laid down in *Co. Lit.* 56. that no one can have an action for a nuisance or obstruction in a common highway, without assigning some particular damage; and this to prevent multiplicity of suits; for otherwise every subject of *England* might maintain an action for the same obstruction. But notwithstanding this general rule it was holden in the case of *Hart v. Bassett* in *B. R. Tr.* 33 C. 2. reported in *Sir T. Jones* 156. that such an action as the present would lie. The case was this; the plaintiff declared that he was entitled to certain tithes, and that his direct way to carry them to his barn was in and through a certain highway, that the defendant had stopped up the highway by a ditch and gate erected ex transverso viæ, and that by reason of such obstruction he (the plaintiff) could not carry his tithes along the said highway, but was forced to carry them by a longer and more difficult way; verdict for the plaintiff and 5*l.* damages. It was moved in arrest of judgment that this being laid in a common highway the obstruction was a common nuisance, and that therefore the action would not lie, to prevent multiplicity of suits, for every one might bring the same action; and *Co. Lit.* 56. was cited; but it was resolved by the whole Court that the action lay; for they said that this rule, that an action will not lie for that which every one suffers, ought not to be taken too largely; for in this case the plaintiff sustained a particular damage; for the labour and pains which he was forced to take with his cattle and servants by reason of this obstruction might be of more value

than, it will be reserved to him by law, as a way of necessity. *Id. sem.* and *Gr. Jac.* 170.

(1) *Vid. Bassett v. Hart, Mich.* 18 G. 2 *post.*

than

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Upon the strength and reason of this authority we are of opinion likewise to overrule the third objection to the second count; for the present case is stronger than the case in *Jones* in two circumstances; first, because it is expressly laid that the plaintiff was attempting to travel this road several times with his coach, but could not by reason of these obstructions; secondly, it is also laid that the defendant in person withstood and opposed him, and prevented him from removing the obstruction, which by law he might do."

"So the rule nisi was discharged, with a hint to the plaintiff (b) to take his judgment only on the second count."

(a) The general rule, that, where the plaintiff only sustains an injury in common with the rest of all the King's subjects by reason of a nuisance in the road or of the road being totally stopped up, he cannot maintain an action, seems to have been admitted in all the cases on the subject; but a question has frequently arisen whether the damage stated in each particular case were sufficient to bring it within the exception to the general rule; and this question has received various determinations according to the circumstances of each case. See the cases 27 Hen. 8. 27; *Moor* 380; *Feneux v. Hovenden*, Cro. Eliz. 664; and *Paine v. Partrick*, Carth. 194; where the damage to the plaintiff was holden not to be sufficient to support an action; and those of *Fowler v. Sanders*, Cro. Jac. 446; *Maynell v. Saltmarsh*, 1 Keb. 847; and *Jacobs v. Moore*, 1 Ld. Raym. 486; 14 Mod. 252; Com. Rep. 38; Salk. 15; and Carth. 451. where the damage was holden to be sufficient for that purpose.—It appears by the two former reports of the last case that according to the opinions of the Court of Common Pleas and Exchequer the action lay; but as the reasons of that opinion are not in print, I have here subjoined the conclusion of a MS. note of that case taken from MS. coll. Willes Chief Justice: "But the Court (the King's Bench) being divided, the matter was reserved for the opinion of the rest of the Judges, who all agreed in the opinion of *Turton J.* and *Gould J.* that the action lay. The reason the Judges went upon was principally this, that it sufficiently appeared that the plaintiff must and did necessarily suffer a special damage more than the rest of the King's subjects by the obstruction of this way; because it was set forth that the only way to come to the coal pits from one part of the county was through this way, by which it must be understood, without any allegation of loss of customers, that the plaintiff did suffer particularly in respect to his trade by the plaintiff's wrong."

(b) In the case of *Russell v. the Men of Devon*, 2 Durnf. & E. 667. it was ruled that the plaintiff could not maintain an action against the inhabitants of a county brought to recover a satisfaction for an injury sustained by him in consequence of a county bridge being out of repair. See also *Vaughl.* 340.

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ROBERT MALLOM on the Demise of JOHN MARSH and
JOHN AMYAS against JOHN BRINGLOE and ELIZA-
BETH his Wife and MARY APOLLONIA BURGESS (a).

E. 11 G. 2.
Monday,
May 15th.

[Tr. 11 GEO. I. Rol. 1625.]

THE opinion of the Court was thus given by

Willes, Lord Chief Justice. "This ejectment for a messuage and lands in *Norfolk* came on upon a special verdict found before the late Lord Chief Justice *Raymond* at *Norwich* assizes.

The jury find that one *John Bedell* before the time of the trespass and ejectment was seised of the premises in fee, viz. 1st *February* 1707, and that he was brought up and educated in the popish religion. That he died on the 28th of *February* 1707, seised of the premises and professing the popish religion. That *George Bedell* was his brother and heir, and that he was born 1st *August* 1683, and was of the age of twenty-four at the time of the death of his brother; and that after the death of his brother he entered upon and became seised of the premises. And the jury find that the said *G. Bedell* in the year 1700 at the time of making the statute (b) intituled "An Act for the further preventing the growth of popery" was under the age of 18, viz. 17 years old. And that the said *G. Bedell* during his whole life was brought up and educated in and professed the popish religion; that he professing the popish religion and being above the age of 21, to wit, the age of 31, died; that he never took the oaths of allegiance and supremacy appointed to be taken by the said statute; and that he never made repeated or subscribed the declarations expressed in the statute 30 C. 2. And they further find that the defendant *Elizabeth Bringloe*, wife of the defendant *John Bringloe*, was the next protestant cousin (c) of the said *G. Bedell*, viz. one of the sisters and co-heirs of the said *John* and *George Bedell*; and that the said defendant *John* and his wife four days before

A papist who has not taken the oaths &c (under an incapacity to hold under stat. 11 & 12 W. 3.) may devise lands to a protestant.—He may sell to a protestant, by stat. 3 Geo. 1. c. 18. f. 4.—He may devise lands for payment of his debts to protestants; and, sensible, may by a bond charge lands &c.

(a) This case is reported in *Com. Rep.* 570. by the name of *Matlem v. Bringloe*.

(b) Stat. 11 & 12 W. 3. c. 4.

(c) Proxim consanguinea protestans in the record.

the

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the death of *George Bedell* entered into the mansion-house and the land thereunto adjoining, being part of the premises and were thereof possessed. And the jury further find that the said *George Bedell* being so seised of the premises made his last will in writing, 9th *August* 1715, and duly signed sealed and published the same in the presence of three witnesses (therein named) who subscribed their names as witnesses in his presence, and that by his said will (which they find prout) he devised the premises in this manner; in the first place he devised to the lessors *John Marsh* and *John Amyas* and their heirs and assigns for the use of them their heirs and assigns for ever all and singular his manors messuages &c. on the trusts for the intents and purposes and subject to the limitations therein mentioned viz. upon trust that they or the survivor of them or the heirs and assigns of such survivor shall in the first place out of the rents issues and profits thereof or by mortgage or sale as they shall think fit levy and raise money sufficient, together with his personal estate and in aid thereof, to pay satisfy and discharge all such sums as he should owe to *John Marsh* at the time of his death with interest and all his other just debts and the several legacies by him bequeathed with his funeral charges and the trustees charges in the execution of his trust, and after satisfaction and payment thereof shall well and truly pay or cause to be paid to *Elizabeth* the wife of *John Mallom* Esquire an annuity of 150*l.* a-year, free from taxes, for her life quarterly to her separate use &c; and upon further trust that they shall pay to his sister *Isabella Bedell* 25*l.* a-year to his sister *Maria Burges* 25*l.* a year, and to his sister *Elizabeth Bedell* 25*l.* a-year during their lives quarterly for their separate uses &c; and subject and liable to the annuities and to the payment of his debts legacies and funeral charges in case any part of his manors messuages &c. shall remain unsold the same are to be in trust to permit and suffer *Robert* son of the said *John Mallom* to receive and take all the rest residue and remainder of the rents issues and profits thereof until he shall attain the age of twenty-one years, and from and after such time as he shall attain the said age upon trust that the said trustees shall at the request and charge of the said *Robert Mallom* convey the same subject to such mortgages as shall be made thereof for the purposes aforesaid and also after the said annuities to and for the sole use and behoof of the said *Robert Mallom* his heirs and assigns for ever; with
a direction

a direction that *John Mallom* the father shall not anyways 1738.
intermeddle with the premises during the minority of his son, but that the same shall be under the sole care and management of the trustees &c; and in case the said *Robert Mallom* shall die before he shall attain his age of twenty-one, then he gives and devises the premises or what shall remain unsold, subject as aforesaid, unto his sister *Isabella Bedell Mary Burges* and *Elizabeth Bedell* their heirs and assigns for ever. Then he gives away several money legacies, and amongst the rest 500*l.* a-piece to each of his trustees, the several legacies to be paid within six months after his death; and makes the said *John Marsh* and *John Amyas* executors.

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The jury then find that *George Bedell* died on the 19th of August 1715 so seised as aforesaid; and that the lessors entered on *John Bringloe* and *Elizabeth* his wife before the time of the demise in the declaration; and being so seised 1st April 10 Geo. 1. made a demise to the plaintiff for sixteen years from the Lady day before, and that the defendants entered upon him and ejected him; and so submit the matter to the judgment of the Court.

Upon this special verdict two questions (a) were made.

1st, Whether *George Bedell* under the circumstances (as they appear in this special verdict) had a power to devise this estate to the lessors of the plaintiff *John Marsh* and *John Amyas*?

2dly, If he had, whether the trusts upon which he devised it make any alteration in the case?

As to the first point. 1st, It will be proper to consider under what circumstances *George Bedell* is found to be at the time of making this will?

2dly, What are the words of the statute under which the present case falls?

1st, It appears that this will was made after the disabling statute 11 & 12 W. 3 c. 4; and it is found that *George Bedell* was under (b) eighteen at the time of making thereof;

(a) This case was twice argued, the last time in Trinity term 1737 by Wright Serjt. for the plaintiff, and Skinner Serjt. for the defendants.

(b) Under the second branch of the fourth section of the stat. 11 & 12 W. 3. c. 4. Papists above the age of eighteen are rendered incapable of purchasing lands &c, which includes a taking by devise. And accordingly it was ruled in *Fairclaim d. Berlace v. Newland*, E. 15 G. 2. B. R. ; 8 Vin. d. 73. pl. 4. that a devise to a papist above the age of eighteen was void,

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of ; that he never conformed by taking the oaths and subscribing the declaration according to that statute ; that he was all along bred up and educated in the popish religion ; and that he professed the same all his life-time, at the time of making the will and till the time of his death. He was plainly therefore such a person as is described in the first part of the disabling clause of that statute ; and the words of that clause are that every such person “ shall in respect of him or herself only, and not to or in respect of any of his or her heirs or posterity, be disabled and made incapable to inherit or take by descent any lands tenements or hereditaments within the kingdom of *England* &c. ; and that during the life of such person or until he or she do take the oaths of allegiance and supremacy and make repeat and subscribe the declaration therein mentioned the next of his or her kindred, which shall be a protestant, shall have and enjoy the said lands &c. without being accountable for the profits received during such enjoyment as aforesaid ; but in case of any wilful waste committed on the said lands &c. by the persons having or enjoying the same, or any other by his or her license or authority, the party disabled his or her executors or administrators shall and may recover treble damages for the same against the person committing such waste his or her executors &c, by action of debt in any of his Majesty's courts &c.” The words of this statute are almost exactly the same as in the statute 1 J. 1. c. 4. s. 6 ; only in that statute there are inserted the words “ purchase, have, and enjoy :” there is no direction who shall have the mesne profits nor any words giving an action to the disabled person to recover

was void, and that a conveyance by such devise to a protestant purchaser for a valuable consideration was also void.—In *Watts v. Meredith*, Com. Rep. 661. and *Bunb. 345.* it was holden that a protestant next of kin might redeem a mortgage made by a popish heir.—And in *Denn v. Warren v. Fernside*, 1 Will. 176. it was determined by three Judges (against the opinion of *Foster J.*) that a lease for lives made to a papist was void, and consequently that the lease was not forfeited to the Crown by the papist's committing treason.—But the future consideration of these questions is rendered almost unnecessary by the stat. 18 G. 3. c. 60. which repeals those parts of the stat. 11 & 12 W. 3. c. 4 respecting the incapacity of papists to hold lands &c, who take and subscribe an oath prescribed by sect 4. An oath in some respects different is required by stat. 31 G. 3. c. 32. s. 1. ; and the learned editor of the last edition of *Co. Lit.* seems to be of opinion that the oath prescribed by the stat. 31 G. 3. was not substituted in lieu of that in the 18 G. 3., but that it is advisable to take both. Vid. *Harg. Co. Lit.* 391. note 346 ; *octavo* edition.

damages

damages for waste ; so these disabling words are rather stronger than in the present case. The words of the stat. 3 Jac. I. c. 5. which gives the mesne profits to the protestant next of kin are likewise pretty much the same, only the disabling part is not quite so strong as in the present case. But there likewise no action is given to the disabled person to recover damages for waste.

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Having stated the clause of the statute which relates to the present case, the question which arises on it is whether, notwithstanding this statute, *G. Bedell* at the time of his will, and at the time of his death, had any estate in him which he could devise ? For if he had any estate in him, there are no words in the statute which prohibit him from devising it to a protestant ; so that it turns merely on this point, whether he had any estate in him ?

Objection ; That by the statute *G. Bedell* was a person entirely disabled to take any estate by descent, and therefore that nothing descended to him from his brother *J. Bedell*, nor could any estate ever vest in him, but that he is to be considered as a monk, or as a person civiliter mortuus. But we think that the cases bear no resemblance. For how can a person be considered as a person civiliter mortuus, who is capable of a gift or grant of any personal thing ; who to all other purposes, except real estates, is under no disability at all ; and who may even take the profits of the real estate as soon as he conforms ; and who by the very words of this statute may, even before he conforms, bring an action of debt to recover damages for the waste committed on the real estate ? Besides we think that in respect to the real estate he is not absolutely disabled to take, but only sub modo ; of which sort there are many mentioned in *Co. Lit.* 2 and 3.

1st, He takes for the benefit of his protestant next of kin till his conformity ;

2^{dly}, For the benefit of himself after his conformity ;

3^{dly}, And for the benefit of his heir after his death ;

4^{thly}, Nay for the benefit of himself during his life, by reason of the action which is given to him.

The inheritance of the estate must be somewhere. It is plainly not in the protestant next of kin.

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It cannot be in the Crown, because no inheritance is given to the Crown.

It cannot be in his heir; for *nemo est hæres viventis* and therefore no one can take as his heir during his life.

The inheritance therefore must be in the person himself. Besides it must be admitted that it will descend to his heir after his death by the express provision of the statute; and his heir must claim through him; and if nothing ever vested in him, nothing can ever descend to his heir. This is certain and known law, and admitted to be so in the great case of *Thornby v. Fleetwood* (a), 17 6 G. 1. which was a case upon the first part of the statute 1 Jac. 1.; the disabling words of which are (as I have said before) much stronger than in the present case. And the resolution in *Tredway's case*, Hob. 73. which is a case on the statute 3 Jac. 1. c. 5. plainly supports this construction.

We think likewise that the inserting the clause concerning waste plainly shews that the Legislature considered the clause in this sense, not only because it gives the party damages for the waste as owner of the inheritance but likewise because it gives him an action of debt which seems to imply that if he had not been confined to an action of debt by this clause he might have brought an action of waste, and recovered the lands themselves where the waste was committed. As to the word "posterity" on which some stress seemed to be laid by the counsel for the plaintiff, it is difficult to put any certain signification on that word; and we think that the case is strong enough without it. It is a known rule in the construction of penal statutes that they must be construed strictly, and the words of them are not to be extended beyond their natural signification. And as this is a known and general rule, God forbid that our zeal for the protestant religion should make us in this single instance deviate from that rule. Besides this construction seems to be most agreeable to the intent of the Legislature. Their design in making this statute was not only to inflict a penalty on papists, but to weaken the popish interest by getting the lands of this kingdom out of the hands of papists. It could never therefore be their intention to prevent their deviling them to protestants; nay to permit and encourage this seems to be rather in further-

(a) Com. Rep. 207; 10 Mod. 113; 356; 405; 1 Str. 318; 2 Br. P. C. 203.

state of the principal design of this act. As to the stat. 32 H. 8. c. 1. and the word "having", which was objected; I have already answered it; for if the inheritance be in the papist, then he hath it in him, and it is within the express words of the statute. We are therefore all of opinion as to the first point that *G. Bedell*, notwithstanding the stat. 11 & 12 W. 3., might well devise his estate to a protestant:

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The next question is, Whether any of the trusts that appeared in the present case do any ways affect or alter the case? It may be a doubt whether we can take notice of the trusts on a special verdict in an action at law, if it appear that the legal estate was well devised to the lessors of the plaintiff. And it would be proper for us well to consider this, if we had any doubt remaining concerning the trusts themselves: but we have none; the trusts have been already stated, and the only one which seems to afford any thing like an objection is the trust for the payment of *G. Bedell's* debts. The annuities and legacies are all given to protestants, and the remainder-man is likewise a protestant, for so they must all be taken to be, they not being found to be under any incapacity. And if a papist can devise his land to a protestant, he may certainly, for the same reason, devise any interest out of his lands to a protestant. And therefore this is founded on the same reason as *Roper* and *Radcliffe* (a).

But as to the case of debts it is said that this is for the benefit of the papist: he may by this means spend all his estate in his life-time, for he may run in debt to the full value of his estate, and by devising his estate for the payment of his debts may frustrate the intent of the statute, and entirely defeat his protestant heir. Besides it might follow from this resolution that the bonds of a papist would affect the lands in the hands of his protestant heir. How that will be, it will be time enough to consider when it comes to be done: but that is not the present case in judgment before us.

And as to the present objection; in the first place it is proper to observe that the act has not prohibited it,

(a) 9 *Mod.* 167; 181; 10 *Mod.* 230; and *A Bro. Parl. Cas.* 450.

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and as Lord Ch. Just. *Eyre* said in the case of *Thornby v. Fleetwood*, we must take the law as it is. Besides I think that the legislature intended to leave this power in him. By the 3 G. 1, c. 18. which is rather declarative of the sense of the Legislature than a new law, a papist may sell his estate to a protestant and do what he will with the money: which shews (what I have already observed) that the chief design of the Legislature was to get the lands out of the hands of papists. And if a man may sell his estate in his lifetime and do what he will with the money, It would be strange to say that he cannot devise it for the payment of his honest debts, nay even though all of them are owing to protestants^(a), for that must be taken to be the present case, it not being said that any one of his debtors is under any incapacity. And surely it would be absurd to hold, what we have already established to be law, that a papist by his will may make a voluntary devise of his estate to a protestant, but that he cannot devise it for a satisfaction of an honest debt due to a protestant. This would be directly contrary to a good rule that was laid down by a very great Lord Chancellor, that such a construction ought to be put upon a will that a testator may be just as well as bountiful: but this would be to enable a testator to be bountiful without giving him a power to be just.

We think therefore upon consideration, though it stuck with me a little at first, that there is nothing in this objection; and we are all of opinion that judgment must be given for the plaintiff^(b)."

(a) So a protestant may devise lands to be sold for payment of his debts to papists *Foone v. Pinkard*, *Ambl*, 320; and *Foone v. Blount*, *ib.* 767, and *Corop.* 464.

(b) This case was recognized and approved in *Jones v. Meredith*, *Com. Rep.* 668.

H. HERVEY and CATHERINE his Wife, Daughter of Sir T. ASTON deceased, and ANN CLUTTON Widow and Relict of THOMAS CLUTTON deceased, another daughter of Sir T. ASTON, - Plaintiffs,

1738.
Trin. 11 &
12 G. 2.
Monday
June 5th.
In Chancery.

AND

Dame CATHERINE ASTON Widow of Sir T. ASTON deceased, Sir T. ASTON Bart. eldest Son and Heir of Sir T. ASTON, Sir J. CHESHYRE Knt. H. WRIGHT, and A. KENRICK, - Defendants.

SIR T. *Aston* deceased, having a son and several daughters, by indentures of lease and release dated 17th and 28th of May 1712, conveyed to Sir J. *Chetwood* and J. *Crew* and their heirs all his manors &c to the use of himself for life, remainder as to certain parts to Lady *Aston* during her widowhood, remainder as to the rest and also to those parts after Lady *Aston's* estate to Sir T. *Aston* (one of the defendants) for life, remainder to the trustees to preserve contingent remainders, remainder to his first and other sons in tail male &c, remainder as to certain premises to Sir R. *Burdett* and Sir J. *Cheshyre* for 1000 years. The trusts of the term were, that, if Sir T. *Aston* (the father) died without issue male and should have only two daughters living at the time of his death, or born after, or who in his lifetime should have been married with his consent, the trustees should raise 5000*l* for the use of the younger of those two daughters *when and as soon as she should be married with the consent of Lady Aston* (if living and not married again) *or* if dead or married again *then with the consent of Sir R. Burdett and Sir J. Cheshyre* or the survivor; and if Sir T. *Aston* (the father) should have a son and more daughters than one at his death, then that the trustees should raise 2000*l*. for the portion of every such daughter, and pay the same to such daughters at the respective days of their marriage *with such consent as aforesaid*. The trustees were also to pay 50*l*. a-year a-piece to the daughters until their ages of eighteen, and afterwards and until

Bequest of money, to be raised on land, to daughters "when and as soon as they should marry with consent of trustees, and if they should die before marriage with such consent" then the portions should not be raised; two of the daughters married without consent; held that they were not entitled to their portions.

1722. their marriage with such content and during the widowhood of their mother till a year a piece. And if any of the conjuncts should die before he or they should be married and full content, then the sum or sums intended for her or their portions should cease and the premises be exonerated therefrom, and if raised should remain and be payable to the person to whom the reversion should belong. On the 26th of February 1722 Sir T. Aston, by will, after reciting the above deeds and the purchase of other lands, devised those lands to H. Wright and A. Kenrick for 500 years on trust to raise 3100*l.* and 1000*l.* to be paid to his executrix as part of his personal estate, and subject thereto he devised this estate to such persons and for such estates &c as in the settlement. Then he directed that out of the sums so to be raised and other his personal estate there should be paid to each of his daughters who should be unmarried and unprovided for at the time of his death 2000*l.* in augmentation of their portions provided for them by the settlement, to be paid to them at such times and subject to such conditions provisoes limitations and agreements as their original portions were by the said settlement made subject to; and in case any of his daughters should die before their original portions became payable, then the sum of 2000*l.* was not to be paid to her executors &c; and he gave the residue of his personalty to Lady Aston. Afterwards on the 17th of July 1723 Sir T. Aston by a codicil directed that the term of 1000 years created by the settlement of 1712 should take place immediately after his death. On the 16th of January 1724 Sir T. Aston died leaving the defendant Lady Aston his widow, Sir T. Aston (another defendant) his only son an infant, and eight daughters, of whom Catherine the wife of H. Hervey and Ann Clutton (two of the plaintiffs) were two.

In Easter term 1725 the eight daughters then unmarried, filed a bill in Chancery for proof of the will and execution of the trusts, which was decreed, with liberty for the parties to apply for further directions &c. In Trinity term 1734 Mr. Hervey and his wife and Mr. Clutton and his wife exhibited a bill of revivor. Lady Aston, in her answer, set forth that Mr. Hervey and Catherine his wife were both acquainted by her before their intermarriage with the terms and conditions upon which

which *Catherine* would be entitled to the respective sums of 2000*l.* mentioned in the settlement and will, that notwithstanding such notice they intermarried against her consent; and that the reason why she refused her consent was that Mr. *Hervey* could not make any settlement on his wife suitable to her fortune, or on their children, that Mr. *Hervey* made no proposal for making any settlement &c; and that Mrs. *Clutton*, being also acquainted with the conditions on which she would be entitled to her portion, intermarried without her privity or consent.

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In November 1736 the Master of the Rolls decreed (a) that the plaintiffs were entitled to the portions under the settlement as well as to those under the will, and to interest from the time of their marriage.

The defendants appealed against this decree; and the case was heard before the Lord Chancellor, assisted by Lee Lord Ch. J. B. R. *Willes* Ld. Ch. J. B. C., and Mr. J. *Comyns*, who after hearing arguments at the bar were unanimously of opinion that the decree ought to be reversed,

This case is reported in 1 *Atk.* 361. The opinion of Mr. J. *Comyns* is also given at length in *Com. Rep.* 726.

The following opinion was delivered by

Willes Ld. Ch. J. C. B. "My Brother *Comyns* has stated the case and the clauses in the deed and will upon which the question arises so very fully and clearly that I will not go over them again. And the question, I think, when stripped of what does not belong to it, lies in a very narrow compass. But the case has been so obscured by the many distinctions that have been taken and the many cases that have been cited, that it will be necessary to remove these clouds before it can be cleared up. Before I take notice of the arguments and authorities that have been offered on the one side and the other, I will put some things that have been insisted on quite out of the way, as being in my humble opinion plain foreign to the point in question.

And, first, what has been said in respect to penalties and forfeitures seems to me to be quite out of the case.

(a) *Vid. Cas. temp. Talb.* 212.

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Here no penalty or forfeiture is insisted on: but the bill and petition are brought by two of the daughters and their husbands in order to have two sums raised which are given to them by the settlement and will of their father; and the only question is whether the time is yet come when the same ought to be raised and paid. That the time may come hereafter and that they will be entitled to these sums if they should happen hereafter to marry again with the consent of their mother, is admitted on all hands; so that the remainder-man in the settlement and the residuary devisee cannot now claim these sums as forfeited, nor can they ever be entitled to them until after the deaths of the daughters.

Every thing likewise that has been said in respect to the absurdity of entrusting so great a power in the executors administrators or assigns of the trustees may, I think, be laid out of the case; because this is not the case at present, but the question depends on the consent of the mother, and whether that be or be not necessary. The restriction may be good so far, though it should be against law to carry it any farther: not that I admit that it is so; but supposing that it were, yet the first restriction, on which only the question depends, may be very good. As supposing a man should give an estate on a condition undoubtedly good, and on this further condition that party do not marry without the dispensation of the Pope, this last condition would certainly be unlawful, and yet it would not discharge the party from performing the other condition which is lawful.

I shall likewise lay out of the case all that has been said in respect to paternal authority, because no distinction is made in any of the cases between gifts by parents to children to which such a condition is annexed and gifts by mere strangers. For the validity of the condition is not at all founded on the authority of the father, but on the consideration of the gift and this known maxim *cujus est dare ejus est disponere*. If a parent should by deed or will restrain a child from marrying without the consent of another without annexing it as a condition to a gift, no one could say that such a restraint would be of any effect in law. And if a distant relation or a stranger give an estate or a sum of money

money to another on a condition, that condition will be as obligatory, I mean in point of law, as if it were imposed by a parent.

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Having thus delivered the question from what (I think) does not belong to it, what remains is only this, whether a man may give a sum of money to another when he or she marries with the consent of a third person, so that it shall be not payable to him or her until he or she perform this condition. For it may be done by any words whatsoever, my humble opinion is that it is done in the present case, at least in respect to the portions given by the settlement.

The gentleman who spoke first for the plaintiffs began in the most artful manner for his client, and therefore spoke to the will first, as being certainly the best part of his case: but that method was not pursued by the rest, who began with the settlement. And the latter method seems to me the most natural one, the settlement not only being first in time, but the sum given by that being the original portion, the will referring to the settlement and the sum given by the will being expressly called an *additional* portion.

Two points have been made by the counsel, and I think very properly;

1st, Whether it were the intent of Sir T. Aston that the daughters should not have their portions until they marry with such consent as he has prescribed, or whether it were his intent that they should be entitled to them barely on their marriage though without such consent.

2dly, Whether, taking his intent to be that such consent should be necessary, such intent can take place according to the rules of law and equity. And these two are (I think) the only material questions both on the settlement and the will. I shall consider the first question at the same time both on the settlement and the will, the intent of Sir T. Aston being (in my opinion) manifestly the same in both. But on the second question, I shall consider the settlement and the will distinctly, the rules of equity being something different in respect to real and personal estates.

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As to the first question, concerning the intent of Sir T. Aston, though even that has been much controverted, I cannot help saying, as was said by a very great man who once presided in this court, that if this question were propounded to the best natural understanding unprejudiced by the learning of the law, the only doubt would be how this could come to be a question at all. For unless we lay aside the natural signification of the words, and make them to signify quite otherwise than they naturally and commonly import, the intent of Sir T. Aston both in the settlement and will is, I think, expressed as plainly as possible. In the settlement he directs that 2000*l.* a-piece shall be raised and paid to each of his daughters *when and as soon as they shall be married with the consent of Dame Catherine Aston if living, and in another place at their respective days of marriage with such consent as aforesaid*; and lest these words should not be certain enough, he expressly directs that *if they die before they are married with such consent the sums intended for their portions shall not be raised*; and until their marriage with such consent he gives them annuities for their maintenance. Then it was said that the words “with such consent &c.” should be rejected: but no words, if sensible, ought to be rejected. If I had been to advise Sir T. Aston how to express his intent, unapprized of the distinction concerning dispositions over which is laid down in so many of the Equity cases, I should not have been able to furnish him with better expressions for this purpose. But he seems likewise to have been aware of this distinction, and therefore in case of his daughters marrying without such consent, he has given the portions over in as plain words as possible; “if any of the daughters shall depart this life before she or they shall be married with such consent as aforesaid, then the sum or sums intended for the portion or portions of him or them so dying shall cease, and the said premises be exonerated therefrom &c.”

The only objection made to this is that he does not give them over *on their marrying without consent, but in case they die before such marriage with consent*. But these words were plainly put in to import that though the daughters married first without consent, if their husbands died and they married a second or a third time with such consent, they would then be entitled to their

their fortunes (a). And this shews plainly (what I have before observed) that the question of a forfeiture is at present quite out of the case. I think therefore that nothing can be more plain than that Sir T. Aston intended that his daughters should not have the 2000*l.* provided by the settlement, unless they married with the consent of Lady Aston.

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And his intent likewise seems to me be equally plain as to the portions given by the will; for, to suppose that when he says that they shall "be paid at the same times, and subject to the same conditions provisoes and limitations as their original portions are subject to," he intended that they should be paid at different times and be subject to different conditions provisoes and limitations, is absurd and contrary to common sense. But, as if he foresaw this plain indisputable point might come hereafter to be disputed, to remove all possibility of doubt he subjoined these words "and in case any of my daughters happen to die before their original portions become payable, then my will is that the said 2000*l.* shall not be paid to the executors or administrators of such of them so dying:" after this, it would be trespassing too much upon your Lordship's patience and the common sense of all who hear me to say any more on this head.

I shall therefore take it for granted that the intent of Sir T. Aston was that neither of the portions should be paid to any of his daughters until they married with the consent of Lady Aston, if living. And if that were his plain intent, why should not his intent take place? Nothing I think can hinder it, unless it be inconsistent with the rules of law or equity, which is the next thing to be considered, and which is (I think) the only question that can admit of the least doubt.

And as to this, I shall consider the settlement and will distinctly.

(a) And upon this ground has the case of *Randal v Payne*, 1 Bra. Cas. 55, been since determined. There the testator gave 4000*l.* to each of two devisees, provided they married into the families of *Gosling* or *Brington*, otherwise the money was given over to the plaintiff; on the two devisees marrying into different families, the plaintiff filed his bill claiming the 8000*l.*, as forfeited to him: but the bill was dismissed, the Lord Chancellor saying that the contingency of the devisees marrying into the two families named suspended the vesting of the 8000*l.* during the lives of the two devisees.

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1st, As to the settlement. Where the intent of the party is plain and clear, as it is in the present case, I think that the rule of law or equity by which such intent is to be frustrated ought to be very plain too, otherwise the intent ought to prevail. For, as was said by Lord Ch. J. Treby in the case of *Bertie v. Lord Falkland*, "men's deeds and wills by which they settle their estates are the laws that private men are allowed to make, and they are not to be altered by the King in his courts of law or conscience, but we must take it as we find it" (a); and Lord Nottingham said in the case of *Parker v. Parker* (b) that in this case every man is his own chancellor. But the rules of law and equity are so far from being contradictory to Sir T. Aston's intent that in respect to the settlement all the cases are in favor of this construction, and I do not know one to the contrary; I mean, considering the portions given by the settlement by the rules which are laid down concerning lands, as it is a charge on the real estate, and I think it cannot be considered otherwise.

The gentlemen who argued for the plaintiffs were so conscious that all the cases were against them if this were to be considered in this light, that they insisted that this was to be considered as a mere personal thing, and consequently to be governed either by the rules of the civil law, or at least by the rules of equity in respect to the disposition of personal things. And their arguments were principally these, that this being a sum of money, though charged upon lands, must be considered as money; that it would go to the executors of the daughters and not to their heirs, and that even lands when devised to be sold and turned into money are always considered as money in a court of equity. But there is a great fallacy in this way of reasoning: it must, to be sure, be considered as money in respect to the interest of the daughters therein, and consequently will go to their executors and not to their heirs; and this is the case of every sum of money that is charged upon lands: but in respect to the lands on which it is charged and the heir who will be affected thereby, it must be considered on a different foot and be determined by a different rule than a portion given out of a personal estate. And the difference has always been if portions be given out of personal estates to be paid at such a time certain and the party die before the time, the portions shall be raised for the

(a) 2 Vern. 337.

(b) 2 Freem. 58.

benefit of his representatives: but if they are to be raised out of the real estate and so make a charge on the inheritance of the heir, if the party die before the day of payment, it shall sink into the inheritance for the benefit of the heir. So is the case of *Tournay v. Tournay* (a), *Pawlett v. Pawlett* (b), and many other cases (c).

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As this sum of 2000*l.* therefore must be considered as a charge on a real estate and be determined by the rules concerning these sort of charges, all the cases are in favor of this construction; for the marrying with consent must be taken to be either a condition precedent or the limitation of the time of payment. If a condition precedent, the case of *Bertie and Falkland* (d) is an express authority that the Court cannot relieve against a condition precedent; nay in the case of *Fry v. Porter* (e), in respect to a condition annexed to lands the Court were clearly of opinion that they could not relieve against a condition subsequent in a case where no compensation could be made. If it be considered as the limitation of the time when the fortunes were to be paid (as it most properly seems to me to be) the cases of *Tournay v. Tournay* and *Pawlett v. Pawlett* which I have mentioned before and many other cases are determinations in point that the portions shall never be raised when the party dies before the time of payment is come.

This would have been so even if Sir *T. Aston* had not expressly declared that it should not be raised before: but it certainly strengthens the case that he himself has expressly declared the same. And taking it as a limitation of the time of payment, even the civil law (as my Brother *Comyns* has taken notice, and as I shall observe more at large on the other part of the case,) has determined that such gifts do not vest until the time of payment is come.

The only cases cited to the contrary stand upon particular reasons, and are plainly distinguishable from this.

The case of *Fleming v. Waldgrave* (f) depends on the particular wording of the condition "in case she did not

(a) *Fry. Chan.* 290.

(b) 1 *Vern.* 204; 321.

(c) See *The Duke of Chandos v. Talbot*, 2 *P. Wms.* 610 &c, and the case referred to in *Cox's* edition, page 612, n. 1.; to which may be added *Pearce v. Leman*, 3 *Vez. jun.* 135.

(d) 1 *Eq. Caf. Abr.* 110. pl. 10. and 4 *Vern.* 333.

(e) 1 *Ventr.* 119.

(f) 1 *Caf. in Chan.* 58.

marry

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marry contrary to the liking of Sir E. *Waldgrave*; and on this the Court principally relied, as it is said in the case of *Creagh v. Wilson* (a): besides the opinion of the Court, as it is reported, is scarcely reconcileable with the case itself; for it is said they were of opinion that it was not in the power of Sir E. *Waldgrave* to dispose of the lease otherwise than for the benefit of the feme sole &c., which is directly contrary to the power in the deed as there stated.

The case of *Ventris v. Glide* (b), as stated by the Master of the Rolls out of the Register, is a case that depends on particular circumstances not applicable to the present case; for there that was done which the Court thought was tantamount to a consent; otherwise there could never have been a decree for the portions according to the rule admitted in all the cases, for there was a plain devise over.

In the case of *Salisbury v. Bennett* (c) the trustees consented, and the Court were of opinion that the father himself had dispensed with the other part of the condition of marrying before sixteen.

The case of *King v. Withers*, as stated in the *Abridgment of Equity Cases* 112. is a case in point for the defendants in this respect, that Lord *Harcourt* declared that it being a portion to be raised out of lands must be considered as lands. But it is true that notwithstanding this, and though in that case there was a devise over, he declared that the portion should be raised. He therefore must have done so upon some particular reason; and the reason was plainly this, because the portion was made payable at the age of twenty-one or marriage, which should first happen, and the daughter was twenty-one before she married without consent; so the portion was absolutely vested in her before her marriage (d), and could not be divested by a subsequent act. The case of *Needham v. Vernon* (e) is a case very particularly circumstanced; and

(a) 2 Vern. 573.

(b) Cited in 2 Vern. 343.

(c) 2 Vern. 223. *Skin.* 285.

(d) According to the report of this case in *Gill. Eq. Cas.* 27. The Lord Keeper said, "The plaintiff must have her whole portion; for the testator has appointed two times, marriage or twenty-one, to entitle her to it; and here she has attained her age of twenty-one, and that singly gives her a right to it. Indeed, if she had married before that age, she must have had her mother's consent, otherwise she was to lose 500*l.*—Upon the same principle Lord Camden decided in the case of *Knapp v. Noyes*, *Ambl.* 662.

(e) *Rep. in Chan.* 62.

Lord Nottingham went upon this ground, that the portions were vested (a) in the daughters before the marriage by the particular words of the settlement; for in that case there was not so much as a marriage, but the daughters declared they would not marry, which is quite different from the present case: but even there he did not think proper to decree them their portions without making them give security not to marry without consent.

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The cases, which were cited to shew that courts of equity will in some cases dispense with the performance of conditions, as for the payment of money and such other things, where an adequate compensation can be made, do not extend to these sort of conditions where no such compensation can be made, as was agreed by the Court in the cases of *Fry v. Porter* and *Bertie v. Lord Falkland*.

I am therefore of opinion that the plain intent of Sir T. Aston in respect to the 2000*l.* given by the settlement is not contrary to the rules of law and equity, but agreeable to those rules.

The case on the will is something more doubtful, but when thoroughly considered it will, I think, appear to be the same. In order to distinguish it some of the counsel for the plaintiffs took this method, and it was certainly the best they could take; they said that the will being relative to the settlement, it must be considered as if there were the same words in the will as the settlement, and then it would be either a void condition or a condition only in terrorem. That this is the case, if it is to be considered in this light, I do by no means admit. But for argument's sake, I will suppose there were the same words in the will as the settlement; and then it is argued that by the civil law, which must be the rule in respect to devises out of personal estates, the condition is absolutely void, and by the rules of equity must be considered as inserted only in terrorem.

Ist, As to the civil law: I do not know that it is of any authority in this kingdom (and I hope it never will) any farther than as it is agreeable to reason and to our

(a) Lord Ch. *Thurlow* seems to have proceeded on the same ground in *Jones v. The Earl of Suffolk*, 1 Bro. Ch. Cas. 529.

constitution,

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constitution, and has been received as our law. But it was admitted by all the Doctors that they could cite no case where it has been determined in our Ecclesiastical Courts that these conditions are void; and the determination in this Court is expressly otherwise, for if the condition be void it could not be made good by a devise over.

2dly, Besides, it is not plain to me that the civil law held these conditions to be void. That law is that general restraints of marriage are void; and with this I would agree, though our law is otherwise, for the devise of an estate durante viduitate is certainly good. But that these conditions of marrying without consent are equally void depends only on the opinion of the commentators; and the reasons that they give for it seem to be absurd. The commentators, who were cited, put the case, if a legacy be given to a person si arbitrato Titii nupserit, and say it is the same as a general prohibition. For quid si Titius non consenserit? Why then, to be sure, it is the same. But put the other alternative, quid si Titius consenserit? (which may as well be supposed) and then there is end of the argument. *Swinburn* and others admit that if a legacy be given to a person in case she does not marry a particular person &c, this is good; and yet I might as well argue that that is a general prohibition; for what, if no one else will have her, which is the same as quid si Titius non consenserit? This shews the weakness of those sort of reasons. *Swinburn* (and so likewise did the counsel for the plaintiffs) relies very much on the great inconvenience that it would be to the public and the commonwealth if these restrictions were to be laid on marriage. Whether or no more inconveniences do not arise from improvident marriages than from these restrictions it may be very difficult to say. But *Swinburn* has put a case himself that makes all his reasons of this sort ridiculous. He says if there be a devise over to some poor scholars at *Oxford*, such a condition is held to be good; so that providing for a few poor scholars quite overbalances all the inconveniences that may arise to the commonwealth.

But even the civil law I think, if it be taken into the case, seems to agree with the intent of the testator. The rule of the civil law (mentioned by my Brother *Comyns*

as from *Swinburn*) is, that where a sum is made payable at a certain day, which must come one time or another, *dies legati credit sed non venit*, that is the legacy is vested but the time of payment is not come: but where it is payable upon a contingency, there they say *dies legati nec credit nec venit*; and if the party die before it happens, there is an end of such legacy. This distinction was taken notice of by Lord *Talbot* and relied on in a case determined by him; and I have been informed your Lordship has declared yourself of the same opinion; and that I think is plainly the present case.

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It has been said that the civil law makes no distinction between conditions precedent and subsequent. I will not dispute about words, but it is plain in effect that they have such a distinction; for it has been agreed that the legacy in this case will not become payable until after marriage, so marriage is in effect a condition precedent. And in the case of the limitation of the time of payment, which the present case plainly is, they hold even that a legacy may be given in this manner. For *Swinburn*, part 4. *f. 12. rule 19.* puts this case; if a man give another the use of his goods, or make him his executor, so long as he shall remain unmarried, the gift or executorship determines on the marriage: and why the commencement of a legacy may not be on a marriage by consent as well as the determination of it on a marriage generally I am at a loss to guess. So that the civil law seems to agree with our law in this, and so far I am for receiving it and no farther.

As to the rules of this court; there is no case of a limitation of time as the present case. The cases are so obscure and inconsistent that I am almost unwilling to mention any of them. But it is a rule generally received here that these sort of devises are only in *terrorem* unless there be a devise over (a). The case of *Creagh v. Wilson* seems to be the only case where this rule is departed from; and there the condition was holden good, though there was no devise over. But I would endeavour to make this rule a reasonable and intelligible rule if possible; and I think it can be made so in no other way than by considering a

(a) Ruled in *Reynish v. Martin*, 3 *Atk.* 330, and 1 *Wils.* 130, and in *Wheler v. Bingham*, 1 *Wils.* 135 and 3 *Atk.* 364, where a personal legacy was given on condition of marrying with consent, and was not given over, that the condition was merely in *terrorem*.

devise

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devise over as an evidence of the intent of the testator &c., without determining that this intent cannot be expressed in any other way. When therefore it is said that the devise is only in terrorem, it is laid down not as a rule of equity that these devises can be only in terrorem, but that if there be no devise over it shall be taken that the testator intended it to be only in terrorem, and so is only an evidence of his intention: but where he expresses his intent to be otherwise, it would be absurd to say that he intended it to be in terrorem. Suppose there should be no devise over, but the testator should declare expressly that he did not intend it to be in terrorem only, or should make use of other declarations of his intention as strong or stronger than a devise over, shall a court of equity say notwithstanding that it shall be only in terrorem: this would be to make men's wills, and not to carry them into execution. The case indeed of *Haywood v. Pagett*, determined by the present Master of the Rolls in Nov. 1733, seems to contradict this; for he is determined that even a devise over will not alter the case if it be to a residuary legatee. But this is a single case; and though I have the greatest regard for his authority as he is a very great master of equity, as I cannot see the reason for this distinction, I own that this case is to me of no weight; and it is directly contrary to the case of *Ames v. Horner*, *Eq. Cas. Abr.* 112. *Mich.* 1699. That was a bequest of 100*l.* to a daughter if she married with consent, if not 50*l.*; and a devise over of the residue of his estate; and it was holden that the daughter who married without consent shall have but 50*l.* It was said that this decree was not to be found on a search in the Register's Book: I have examined into this, and find that on the first hearing of this cause there were not proper parties; but it appears from the Register's Minute Book M. 1699 that the cause came on again and that a decree was made, though no decree was ever drawn up; the reason of which might have been, because it was against the plaintiff; if it had been for him, he would certainly have drawn it up. Upon this I inquired of the author of the book, who told me that he had this case from a person of very good credit, who told him that he had it from a person of indisputable skill and veracity who took it himself in the Court of Chancery; so I think that this authority seems to be pretty well established.

I have

have hitherto argued on a supposition that the very
 ds of the settlement were inserted in the will; and if
 were, then I think there must be a limitation over to
 heirs of Sir T. Aston, and that would put an end to
 question. But I think this is not the proper way of
 sidering the case; for when the testator has given it
 the same conditions &c, such words must be inserted as
 signify the same in a will as the others do in a settle-
 nt, and not such as will have a different construction
 gh the same words. As for example; suppose a man
 old by will give his estate in D. to A. and his heirs male,
 should direct that his trustees should convey his estate
 to the same uses, must the conveyance be drawn in
 same words as the will? Certainly not, because then
 ples would be different: but the conveyance must be
 A. and the heirs male of his body (u). And if words are
 be inserted in this will, they must certainly be such
 rds as would make the portions payable at the same time
 l subject to the same conditions &c as the portions given
 the will; and if so, there is an end of the question.
 ides there are words in this will, which I just hinted
 before, which I think take away all doubt, and make
 case quite different from any that has happened before.
 he says expressly that "if any of his daughters should
 pen to die before her or their original portions become
 pable, then the said 2000*l.* should not be paid to the ex-
 cutors &c of such of them so dying." If therefore one
 these daughters were dead, it is plain that her execu-
 n could not recover the portion: and why not? Because
 e testator declared it should not vest before such marriage;
 r if it did, it would go to the executors, and yet if it be
 ermined that the plaintiffs are entitled, it must be upon
 is supposition that it did vest before. Suppose a daugh-
 r and the executors of another daughter were to join in
 bill of this sort, the executors could not recover by the
 press words of the testator; and if the daughter should
 ve a decree notwithstanding, it would be the most in-
 onfistent decree that ever was made.

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 against
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Much has been said to shew that courts of equity in cases of
 the fortunes of children, who are considered as creditors, will

(*) Vid. 1 P. Wms. 106; 143; 291; 622.

which I have already offered that the plaintiffs are not entitled to their portions either by the settlement will.

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glad I am so fortunate as to agree with my Brother for whose judgment I have a great respect, but I am so shall both of us readily submit our opinions to the majority's much better judgment (a)".

Mercer v. Hall, 4 Bro. Ch. Caf. 316. a general consent to marry a devisee pleased was holden sufficient. In *Daly v. Clanrickarde*, 155, reported in 2 Atk 261. by the name of *Daly v. Dejourverie*, a consent was sufficient. In *Crommelin v. Crommelin*, 3 Ves. jun. condition was holden not to extend to a second marriage, the having married between the date of the will and the father's being a widow at the time of his death. And in *Lord Strange v. M. 163*, it was ruled that the trustee, having once consented after wards withdraw his consent.—See the case of *Scott v. Tykes*, Caf. 431.

AS COCKERILL against MATTHEW ARMSTRONG and Six Others.

Trin. 11 &
12 G. 2.
Tuesday.
June 2 th.


The opinion of the Court was thus delivered by

Lord Chief Justice. "Trespass for taking lead and impounding a gelding of the plaintiff's and putting him in pound for the space of four days &c 30l.

Defendants all pleaded a special plea, that the place where the gelding was taken at the time when &c was a parcel of the *Weapons* containing 1000 acres of pasture of which said 1000 acres the bailiffs and burgesses of the borough of *Scarborough* were at the time seized in their demesne as of fee, and because the gelding in the declaration mentioned at the time when in the said 1000 acres feeding upon and eating the corn there growing, and doing damage there, the defendants shew &c as servants of the bailiffs and burgesses of the said borough and by their command took the said gelding

De injuria sua propria absque &c is not a good replication, where it puts several matters in issue;—As where replied to a plea (to trespass for taking cattle) that A. was seized in fee of the locus in quo, and that defendants as his servants took the horse &c damage feasant.—Nor

replied where defendant either in his own right, or as servant to another, is interested in the land or way &c, where the plaintiff in his declaration makes a title to any thing and the defendant replies against it or in destruction of the cause of action; there they reply specially. Com. Rep. 582. and 7 Mod. 247. 8 vo. edit. S. C.

1738. gelding so feeding and doing damage there, and impoun-
 the said gelding in the common and open pound at
 COCKERILL *borough* aforesaid, and detained him there for the time
 against tioned in the declaration, as it was lawful for them to
 ARM- which is the same trespass &c.
 STRONG.

The plaintiff replies that the defendants took away
 impounded the said gelding of their own wrong with-
 out any such cause &c.

The defendants demur; and for cause of demurrer
 that the plaintiff in his replication hath traversed the
 several matters contained in the plea, whereas he sh^d
 have traversed one single matter, whereon a proper
 might have been joined; and that the said replication
 is uncertain &c. The plaintiff joins in demurrer.

The single question is (a) whether *de injuriâ suâ* pro
 absque tali causâ be a good replication; and we are of
 opinion that it is not a good replication, for two reasons
 both expressly laid down in *Crogate's case*, 8 Co. 66.

The first of them is the reason assigned as the cause
 of the demurrer, because it puts several things in issue
 whereas the issue ought to be plain and single. For upon
 the issue the defendants must prove that the bailiffs were
 in fee (or at least that they were possessed;); that the
 defendants acted by their command (b) that the gelding
 at the time when he was taken was in a close called *Weyn*
 and that he was depasturing the grass and doing damage
 there (c).

(a) This case was twice argued, the first time in *Essex* 1738 by
 King's Serjt. for the defendants and Host's Serjt. for the plaintiff
 again on the 10th of June 1738 by Wynne Serjt. for the former, and
 a Serjt. for the latter.

(b) The distinction is between trespass *clausum fregit* and an action
 of trespass for taking cattle or replevin: in the first case, if the defendant
 justifies entering by command or as bailiff to a person in whom he lays title
 the plaintiff cannot traverse the command in his replication: but in the
 other cases if the defendant justifies taking the cattle as bailiff to
 whom he states the title to be, there the command is traversable.
 —, 1 *Rel. Rep.* 46; *Fulcr v. Trimwell*, 2 *Lea* 215; and
Allen v. Paine, *Said*, 10.

(c) But though the plaintiff can only put one single point in issue
 it is not necessary that that point should consist of a single fact; for in *Allen*

The other rule which is laid down by Lord Coke is that 1738.
 when the defendant in his own right or as servant to another, claiming any interest in the land or any way or pasture therein or rent issuing thereout, justifies the trespass, de injuriâ suâ propriâ absque tali causâ is not a good replication (a): and *Crogate's* case is exactly parallel to this, only the present is a little stronger. There the action was only for ~~damaging~~ the plaintiff's cattle, which does not so much as imply any claim of right in the defendant; but here it is for ~~taking away and impounding~~, which seems to imply a claim of right. And the plea is almost the same as this; for the defendant justifies as servant to one who claims a right in the place where, only it is not said there that the cattle were damage feasant. So that in that respect likewise the present case is stronger than that. And yet though the case in *Coke* is not so strong as the present in these two respects, de injuriâ suâ propriâ absque tali causâ was holden on a demurrer by the whole Court after a solemn argument not to be a good replication.

COCKERILL
 against
 ARM-
 STRONG.

I do not at all rely on the case in *Cro. Jac.* 599, because absque tali causâ is there omitted. But the case of *Taylor v. Markham*, *Cro. Jac.* 224, and *Yelv.* 157 (b), though cited for the plaintiff in this case, makes I think rather against him. The case itself is plainly distinguishable from this; for the action is an action of assault and battery, where the title of the land can never possibly come to be material. But it is expressly there laid down that where the plaintiff in his declaration makes a title to any thing and the defendant pleads another thing against it or in destruction of

(a) It has been since determined, in *Jones v. Kitchin*, *Bos. & Pull. Rep. C. B.* 76., that a plea de injuriâ suâ propriâ absque tali causâ to a cognizance for rent in arrear is bad.—See also the observations of the Lord Chief Justice *Eyre* on this case, as it is reported in *B. N. P.* 93.

(b) 1 *Brownl.* 215. S. C.

Reley, 1 *Burr.* 316. where to trespass the defendant justified under a right of common, the plaintiff in his replication traversed "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle," the replication was on a special demurrer (assigning for a cause that it was multifarious) holden to be good.—So, according to the first resolution in *Crogate's* case, "on a justification by force of any proceeding in the admiral court, hundred or county, or any other which is not a court of record, there de injuriâ suâ propriâ generally is good, for all is matter of fact and all makes but one cause."

1738. the cause of action of the plaintiff, there the plaintiff replied specially, and de injuriâ suâ propriâ absque tali causa. *Cockrell* is not a good replication; which is exactly the present case. And there is a case cited in *Yelv.* out 14 *Hen. 4.* 32. 1. *agains* *ARM-STRONG.* pass for taking the plaintiff's servant; the defendant pleads that the father of the person taken held of him by knight service and died seised, the person taken being under; and that he seized him as his ward; the plaintiff replied injuriâ suâ propriâ absque tali causâ, and held to be a good replication; which case seems to be exactly parallel to the present. I do not rely at all on the case of *Croft v. Monke* and others (a), which was determined in this case as to this point in *Hilary* term 1737; because that is an action for breaking and entering an house, which to sure is plainly distinguishable from the present case. The case in *Cro. Eliz.* 812. of *Whitnell v. Cook* seems to be a case in point. Replevin for taking cattle; the defendant as bailiff to one *Payne* seised of the third part of the plot where, justified taking them damage feasant; the plaintiff pleaded that a stranger was seised of the other two parts, and that he put the cattle in by his license, de injuriâ suâ propriâ &c by the defendant; and that held on a demurrer not to be good, but judgment for the plaintiff.

It is said indeed in the case of the *Archbishop of Canterbury v. Kemp*, *Cro. Eliz.* 539, that where the defendant himself claims an interest in lands this is not a good replication, but where he justifies by command of another claiming interest, there it is: but this seems to be a distinction without a difference, as the title to the land may equally come in question, and is alike necessary to be proved in both cases; and it is directly contrary to *Croft* case.

Whether or no in the present case it was necessary for the defendant to set forth a title, or whether he might have relied only on a possession, (as this is not a quare clausi fregit, but an action for taking a personal thing without claiming any right to the place) we need not determine (though I think it was not necessary;) because he having

(a) *Sup. Hil.* 1737, page 52.

ed on a seisin in fee, we think it is more than an in-
 nent (a), and that it is necessary to prove it, or at least
 sion which is *prima facie* a proof of a seisin in fee,
 ill be exactly the same thing in respect to the present

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DOCKRILL
 against
 R. M.
 STRONG.

And there is a plain difference between the present
 ed the case of an action for an assault and battery;
 le there if the party be possessed, even though the
 ff should have a title to the house or place it will
 nothing? for his bare possession will justify him even
 g the right owner out of the house: whereas here if
 laintiff has a right to the place where &c for right of
 on &c, it may quite destroy the defendants' plea.
 he present case is the stronger, as the defendants have
 ly assigned this as a cause of demurrer.

: are therefore all of opinion that judgment must be
 e defendants (b).

but where a matter of record or title is only alleged as inducement
 plea, there a replication de injuriâ suâ propriâ generally is good.
Gerrard, Latch 221; and *Taylor v. Markham*, cited *sup* 101.
Id. Ball v. Wardell, East 1740, *post*.

ILLISENT SHIPMAN *against* A. THOMPSON.

Trin. 11 &
 12 G. 2.
 Monday,
 June, 19.

THIS came before the Court on a case reserved at the
 trial before Mr. Baron *Fortescue*.

An execu-
 tor may re-
 cover in his
 own name
 money due
 to the testa-
 tor in his
 life-time,
 and receiv-
 ed by the
 defendant
 afterwards.
 —In such an
 action the
 defendant
 cannot set
 off a debt
 due to him
 from the
 testator.

e plaintiff's late husband by his will made the plain-
 id Dr. *Morgan* (since deceased) his executors. In his
 me he had appointed the defendant his steward by
 of attorney, who after the testator's death received of
 l tenants several sums of money due to the testator in
 e-time. The plaintiff brought this action in her own
 , not naming herself executrix, for the money so re-
 b. The defendant gave notice to set off several sums
 rom the testator to him, which the Judge would not
 t the defendant to set off.

i. P. 180. Sir G. Cook, 151. *Pract. Reg.* 268. 7 *Mod.* 246. 8vo. edit. 8. C.

The

1738. The questions reserved were; 1st, Whether the plaintiff should not have declared as executrix; 2dly, Whether the defendant ought not to have been permitted to set off the money due to him from the testator.

SHIPMAN
against
THOMPSON

The Court, after argument, gave

Judgment for the Plaintiff

(a) The reasons given by the Court of Common Pleas do not appear in Lord Chief Justice *Willis's* papers: but the same case was referred to the opinion of Mr. D. *Fortescue* (1) before whom the cause was tried, and the *Easter* term preceding after hearing the case argued by Mr. *M.* for the defendant and Sir *T. Aney* for the plaintiff gave the following judgment in favor of the plaintiff.

"It is insisted on for the defendant that this money received by the plaintiff in the executrix in *auter droit*, that as she hath no right of her own in the action must follow the right, and that therefore she should have brought the action as executrix and not in her own right. And the case of *6 Mod. 4.* was cited where it is said if executor bring trover *decide that he is possessor as executor to J. S.*, if on evidence it appear that he were his own goods he shall be nonsuit and pay costs; and it was said that by a parity of reason where the executor brings an action in his own name and it appears that they were the goods of the testator, he can be nonsuited. As to this, there is no doubt but that the plaintiff in this case is entitled to all the effects of the testator in *auter droit*, and all effects are: but if this were an universal rule that therefore the action must be brought as executor, the executor could in no case bring an action in his own name for any goods or effects of the testator, in some cases it is certain that he may. As where the testator's goods are taken out of the possession of the executor, he may bring trover in his own name (2), because it is an immediate tort to him, though he is not owner of these goods in *auter droit*. By this also it appears that it is not a necessary consequence that, because if the action is brought in the plaintiff's name as executor and the goods appear to be his own, he must be nonsuited: therefore he must be nonsuited if he bring the action in his own name.

(1) It seems to have been not unusual at this time to refer the case first to the Judge who tried the cause, and afterwards to the Court, the parties were dissatisfied with his opinion.

(2) So in an action of assumpsit brought on a foreign judgment recovered by the executor, the plaintiff may declare in his own right, as an executor; *Crawford v. Whitall*, H. 13 G. 3. B. R. Dougl. 4. — An executor may maintain an action in his own name against a sheriff for escape of a prisoner who was in execution on a judgment obtained by an executor; *Benjamin v. Walker* 2 Dougl. & E. 126. (contra *Gilew v. Kendall*, 1 Latw. 893; *Reynell v. Langcote*, Cro. Jac. 100; *Reynell v. Cook*, 1 Show. 57; and *Wate v. Briggs*, 1 Ld. Raym. 35. where an executor pays money which he was not obliged to pay afterwards brings an action to recover it back, he may declare in his own right; *Atout v. Sider*, 4 Dougl. & E. 561. — And if an executor sues on a conversion in his own time, or assumpsit for money received after the testator's death, and fail, he is liable to pay costs to the true owner himself executor; *Atkey v. Heard*, Cro. Car. 219; *Atkey v. Heard*, 1 Ld. Raym. 100; *Harris v. Hanna*, Rep. temp. Hardw. 204; *Guthrie v. Pitt*, 1 Dougl. & E. 234; and *Boillard v. Spencer*, 7 D. & E. 358 which last case a contrary determination in *Cockrell v. Kyngdon*, 4 D. & E. 477, was overruled.

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If the goods appear to be the testator's; for in that case it is manifest that he cannot recover his own goods as executor, and fails in proving his debt of action which was to recover the goods as the goods of the testator. The true distinction, I think, is this, that where the thing sued is assets in the hands of the executor or administrator before the recovery, or where the cause of action arises in the executor's own time and did arise to the testator, there the executor may bring the action in his own name or as executor. And this is laid down as law in the case of *Jenkins and his wife v. Plombe*, *Salk. 207.*, but better and more reported in *6 Mod. 92, 181.* That was an action brought by the husband and wife as executrix upon an indebitatus assumpsit for money had received by the defendant to their use as executrix: it is true that the verdict of the court was only that upon being nonsuit the plaintiffs ought to pay costs: but the reason of the judgment was because they might have brought the action in their own name and not as executrix; for whereas an executor may have the action in his own name he shall pay costs. And see of *Essex v. Moxon*, *Salk. 314.* was cited there, and this difference taken, there were several counts by a plaintiff as an executor one whereof was an assumpsit computasset and being nonsuited he paid no costs, because there was no new cause of action, but a new action ascertaining the ancient debt, which is still a debt of the testator's. And in the case of *Jenkins v. Plombe*, as appears from *Salkeld*, this distinction of assumpsit computasset was taken; and it was said that if the defendant received this money by appointment of the plaintiff it was assets immediately, if without his appointment the bringing of the action is such a consent that upon judgment it shall be assets immediately before execution, which otherwise it did not be until after execution; and the reason is because it is recovery against a person who never was indebted to the testator and the old debt was discharged.

I apply this to the present case; here is money received by the defendant after the testator's death, and therefore it could not be received to the use of the testator, but must be received to the use of the executor. The testator has consented by bringing the action, and the money is assets immediately upon the judgment. It is quite a new debt created from the time to the executor since the death of the testator, and a new cause of action which was not subsisting before. The defendant was never indebted to the testator for this money, and the original debtors, the tenants, discharged. No doubt had the action been brought against the tenants, it might have been brought against them by the plaintiff as executrix, because it was a debt as to them subsisting in the testator's lifetime and no new cause of action arising to the executrix.

It is said that, as this case of *Jenkins v. Plombe* is stated in *6 Mod. 92*, *181.* and *Gould J.* doubted: but whatever they might have done on their argument, it is plain they were satisfied afterwards; for in 181 it appears that the judgment was given per totum curiam.

It is said that the defendant had an authority by letter of attorney to receive the testator's rents, that this authority did not determine with the testator's death, and that therefore as the defendant received it by the authority of the testator it is money had and received to his use, and if not he presumed to have been received by the consent of the executor. I think as this is a naked authority and not coupled with any interest it did not subsist after the testator's death. In *Combe's case*, *9 Rep. 76. b.* it is resolved that where a person has authority as an attorney to do an act he must do it in the name of him who gave the authority; for he is intrusted the attorney to be in his place and represent his person; and for reason the attorney cannot act in his own name, nor do it as his own but in the name and as the act of him who gave the authority. And it is so, it is impossible to say that this defendant received this money by authority for the testator or that he represented his person, in regard the testator was dead; it is the executrix only who represents the testator and stands in the place of the testator.

his

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CHRISTOPHER TREVETT *against* MARY AGGAS (*a*). Trin. 11 &12 Geo. 2. Wednesday
June 21st.
T on a bond given by the defendant to the plaintiff for 8*l.*, dated 24th of June 1727.One deed
may a-

The defendant cravedoyer of the condition, which was the payment of 41*l.*, on the 25th of *December* next to the date. And then pleaded that after the sealing and delivery of the bond and before the suing out of the original writ, on the 12th of *March* 1729 the defendant paid to the plaintiff all the money then due on the bond, except 40*l.*, and the plaintiff by his deed in writing sealed &c for him his heirs executors &c covenanted promised and granted with the defendant her executors &c that if the defendant &c should pay to the plaintiff &c five *shillings* for twenty *shillings* due from the former to the latter, and the same rate for every greater or less sum than 20*s.*, before the 25th of *December* next ensuing the date of the deed, the plaintiff &c would accept the same in full charge and satisfaction of all such money as then was or to be due on the said 25th of *December* should be due from the defendant to the plaintiff &c; and that from and after payment of the said sum of 5*s.* in the pound &c according to the intent and meaning of the said deed the same deed should be sufficient release acquittance and discharge to the defendant &c to be pleaded and given in evidence in any action of law or equity for such sum as then was or on the said 25th of *December* should be due from the defendant to the plaintiff. That on the said 12th of *March* the defendant was not indebted to the plaintiff in any sum, save only the sum of 40*l.* That on the 24th of *December* next ensuing the date of the said deed and before the suing out of the original writ the defendant was ready and offered to pay the money due on the bond) pleaded a tender and refusal of the 5*s.* in the pound on the 25th of *December*; and held good — In pleading a tender of a sum of money according to the condition (which is in a different instrument from the original deed) it is not necessary to plead that the party has always been and still is ready to pay, or to bring the money into court: it is sufficient to plead that on the day he tendered &c. either, if the defeazance be in the same deed.

This case is reported in *Com.* by the name of *Trevet v. Aggas, Com. Rep. 568.*

to

1737. To the payment the sum of 10*l.*, being the sum of 5*s.* in
 pound due and owing on the 12th of March 1729 to
 plaintiff from the defendant according to and in pursuance
 of the last writ, which said sum of 10*l.* the plaintiff
 now offers to accept &c.

To this plea the plaintiff demurred, and shewed in
 excoise that the defendant had not alleged in her plea that
 she had always been ready from the time of the supposed
 tender mentioned in the plea to pay the said 10*l.* to the
 plaintiff, or that she had brought the said 10*l.* into court
 and that the plea was not issuable &c.

The defendant joined in demurrer.

This case was twice argued; the first time on *Friday*
February 3d 1737 by *Byre* Serjt. for the plaintiff, and
Burnett Serjt. for the defendant; and the second time on
Thursday June 16th 1737 by *Wright* Serjt. for the plaintiff
 and *Prime* King's Serjt. for the defendant; and the judgment
 of the Court was this day given as follows by

Willis, Lord Ch. Just. "Four objections were made on
 the part of the plaintiff to this plea;

1st, That the deed of the 12th of *March* 1729 does
 not amount to a defeazance, and cannot be pleaded as such

2dly, That, if it could, it does not appear to relate
 to the bond in question.

3dly, That, if it did, the defendant has not tendered
 in the pound for what was due on the 24th of *December* 1730
 which he ought to have done by the express words of the
 agreement.

4thly, Which is the only reason that is insisted on as
 cause of demurrer, that she has not pleaded that she
 always been ready to pay the 10*l.* according to her tender
 nor brought the same into court.

As to the first objection: We are of opinion that the
 deed may be insisted on as a defeazance, and that there are
 words in it which sufficiently shew it to be so within the
 rules that have been laid down in all the cases that have
 been cited in respect to this part of the case. It is further
 that the money, when paid, shall be accepted and taken
 by the plaintiff in full discharge and satisfaction of all sums of
 money

by that were or should become due to him on the day so mentioned; and that on the payment thereof the deed should be a sufficient release acquittance and discharge to the said *Mary Aggas* her executors &c, to be read and given in evidence in any court of law or equity for all such sums as were then or on the said 25th of ~~her~~ should be due or owing to the said *Christopher &c.* the said *Mary &c.* We are therefore all of opinion this is more than a covenant, and that it may be in law as a defeazance (a); and wherever it can, we think it ought, to avoid circuity of actions which the law abhors (b).

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AGGAS.

to the second objection, that it does not relate to the deed, we think that to a common intent (and pleaded if to a common intent) it must be construed to do so. For it does not appear that there were any transactions between the plaintiff and the defendant, other sum due from the defendant to the plaintiff or money due on the bond. If there had, we think the plaintiff ought to have shewn it in his replication. Even in the case of lands, which is much stronger than this, and in the case of the execution of a power, it is to be more strictly construed than any other case. However, it has been holden that words of relation &c. are necessary. So in *Scroope's* case 10 Co. 143, 4, and in other cases, it has been adjudged that a deed may be construed as the execution of a power, though it does not at all to or take any notice of the deed in which it is. Besides in the present case it is expressly

1. *Hodges v. Smith*, Cro. Eliz. 623.—If the obligee covenant (by deed) not to put the bond in force at any time, the covenant pleads in bar to an action on the bond, as a release: but if he covenants not to put the bond in force for a certain limited time, it cannot be pleaded in bar, but the obligor must resort to an action on the covenant. *Hodges v. Scrimpsire*, Carth. 64; 1 Show. 46.—But where the obligor covenants over his interest in a house to the obligee in trust to sell and divide the proceeds among the creditors, who all covenanted, on receipt of the sale in proportion to their debts to give a general release to the obligor, and not to sue the obligor in the mean time, it was held that this covenant operated as a defeazance and might be pleaded in bar to an action on the bond. *Carvell v. Edwards*, Carth. 210, w. 330. See the cases on this subject collected in *Dean v. Newnham*, 15 East. 168.

2. *Fowell v. Forrest*, 2 Saund. 48.—But see also *Clayton v. Kynaston*, and *Lacy v. Kynaston*, ib. 575. 1 *Ld. Raym.* 668; and 12 *Mo.* 548.

averred

1738. averred in the plea that the defendant owed the plaintiff the time of this deed no other sum than the said sum of 40*l.*; and if so, it must relate to it.

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Thirdly; As to the defendant's having only tendered in the pound for what was due at the time of the deed, and not 5*s.* in the pound for what should be due on the 24th of *December*, the time of the tender, which was 7*s.* 6*d.* more, there being then 30*s.* more due for the quarters of a year's interest on the bond, we think the agreement did not oblige her to it. For the agreement is that she shall pay 5*s.* in the pound for every twenty *lings due*, which must be construed to mean the same *now due*, or *due at the time of the agreement*. The 25th of *December* is only mentioned afterwards as the time for the payment of the money. And though it is said that such sum shall be a discharge of what should be due on the 25th of *December*, we think that will not alter the case; for the sum which is to be taken in discharge is the sum before mentioned, which is only 5*s.* in the pound for what was due at the time of the agreement,

Fourthly; As to the last objection, which is the one that is insisted on as a cause of demurrer in the pleadings, we are of opinion that the pleading of a tender and refusal in this case is sufficient, and that it was not necessary for her either to bring the money into court or to say that she always was and is still ready to pay it; it being a sum collateral to the sum in the defeazance, and though a lesser sum than that it is not to be considered as part of

There are several cases express to this point. In *Lit.* 207. it is expressly laid down in case of a mortgage that if the mortgage-money be once tendered and refused the mortgagee is without remedy, because the money is collateral to the lands. And it is said also that if a man bound by bond or recognizance, and afterwards the obligor or conusee signs a defeazance for the payment of a lesser sum at a day, if the obligor or conusor tender such lesser sum at the time and the obligee or conusee refuse to accept it, he is without remedy, and the conusor or obligor is not obliged in pleading to say that he is still ready

same," or to tender it in court, which is ex-
ne case as the present. In that case there was
son to say that the lesser sum was part of the
as in this case. The same is expressly laid
v in 9 Co. 79. b. in the argument in *Peyton's*
re said to have been so determined in 33 Hen.
he same is likewise so expressly determined in
Cotton v. Sir G. Clifton, Cro. Eliz. 755, but
hat it would be otherwise if the bond and de-
re in the same deed (a). The same likewise is
is undoubted law in *Moor 36. pl. 119*. And I
one case to the contrary. So that I take this
so clearly settled that there is no occasion to
e cases or to say any more upon it.

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Therefore all of opinion that there is no weight
e plaintiff's objections to the defendant's plea,
ently that judgment must be for the defendant."

Bro. Abr. "Tout temps pris," pl. 1 & 2. S. P.

or and Burgesses of the Town of NOT-
GHAM against RICHARD LAMBERT.

M. 12 G. 2.
Saturday,
Nov. 25th.

Following opinion of the Court was thus delivered by

ord Chief Justice. "Case. This case comes
Court on a special verdict found at the assizes
e county of Nottingham on Thursday the 28th
6.
stiffs declare that the town of Nottingham has
ut of mind a town corporate, called by several
ding to the several charters in the declaration set
that by their last charter 19th October 4 W. & M.
ncorporated and are still stiled by the name of
and Burgesses of the town of Nottingham, which
a county of itself by the charter 15th September

A prescrip-
tion to take
a toll for
passing on
an ancient
navigable ri-
ver through
the plain-
tiff's manor
is bad in law
— A pre-
scription for
toll tho-
rough can-
not be sup-
ported in
law, unless
a considera-
tion be
shewn for it.

That the manor of Nottingham is an ancient

—Aliter of a toll traverse, where a consideration is implied,
e a duty in which the plaintiff claims an inheritance.

manor,

1738. manor. and that time out of mind till the 15th of September 28 Hen. 6. it was parcel of the county of Nottingham, &c. from that time and still is within the county of the town of Nottingham. That the river Trent in and throughout the said manor is and time out of mind hath been an ancient navigable river; and that the mayor and burgeses of Nottingham and all their predecessors by their several names in time out of mind had and received and used and ought to have and receive by their ministers and servants a certain duty or toll of every master or navigator of every boat barge or other vessel laden with goods wares or merchandizes navigated on the said river Trent through the manor aforesaid (the said master or navigator being a foreigner and not a burges or a freeman of the said town viz. 2d. a ton for every ton of goods loaden and being upon any vessel so navigated as aforesaid.

The Mayor
&c. of the
Town of
Nottingham
agents
Lambert

They then set forth that the defendant at the time when &c. was not a freeman or burges but a foreigner and that he on the 4th of September 1735 was master and navigator of a vessel in which four tons of goods were loaded, and which vessel on the same day was navigated by him on the said river Trent through the said manor of Nottingham, whereby he became indebted to the plaintiffs 8d., being 2d. for every ton so navigated, and that being so indebted he promised to pay the same to the plaintiffs but that he hath not paid the same.

The plaintiffs likewise further declare for a toll for passing through a bridge. There is likewise a general count for the duty demanded in the first. But upon these two last counts there is a general verdict for the defendant, on the general issue pleaded; so that they are now quite out of the case.

And the question only arises on the first count, in which the defendant likewise pleaded the general issue that he made no such promise; and upon that the jury found a special verdict.

And they find that the town of Nottingham was an ancient town, and that it was incorporated by the several names and by such charters as are set forth in the declaration, and that it was erected into a county of itself by charter.

the 28 H. 6. They find likewise that the manor of *Nottingham* is an ancient manor, and that time out of mind the 15th September 28 H. 6. it was parcel of the county of *Nottingham*, and from that time till now was and is in the county of the town of *Nottingham*. They further find that the river *Trent* in and throughout the said river is and hath been time out of mind an ancient navigable river, and did anciently run and doth now run through the said manor of *Nottingham*; and that the mayor and burghesses of *Nottingham* and their predecessors by their names of incorporation have time out of mind had received and have used to have and receive by their ministers and servants a certain duty or toll of every master or owner of every boat barge or other vessel laden with goods navigated on the said river *Trent* through the said river (the said master or navigator being a foreigner not a burghess or freeman,) viz. 2d. a ton for every goods loaden and being upon every such vessel navigating and passing on the said river through the said manor. They further find that there was not any consideration for the payment of the said duty to them at the trial for the payment of the said duty.

They further find that that part of the said river which runs through the said manor and on which the defendant used his said vessel is between a certain town or place or known by the name of *Gainsborough* in the county of *Lincoln* and a certain place called *Wilden Ferry* in the county of *Derby*, both mentioned in a certain act of parliament thereinafter found. And they find that there was an act of parliament made at a sessions holden on the 6th November 1698, intituled, "An act for making and keeping the river *Trent* in the counties of *Leicester*, *Derby*, and *Nottingham* navigable," and that the same is yet in full force and effect (though there was no occasion for finding this, as a public act).

They also find the fact that the defendant on the 4th of November 1735 was master or navigator of a vessel on which tons of goods were loaded, and that the same was transported by the defendant on that day on the said river through the said manor of *Nottingham*; and that the defendant hath not paid to the plaintiff 2d. a ton for so doing. They likewise find that the defendant is not nor was he the said 4th of September nor at any other time before nor since a burghess or freeman of the said town of *Nottingham*.

1778. *ham*, but is and was a foreigner. And they conclude usual, and submit the matters of law to the judgment of the Court.

The Mayor of the Court.
&c. &c. Not.

TINCHAM
 against

LAMBERT.

Upon the arguing (*a*) of this special verdict three questions were made, which, though the plaintiffs began, most properly come by way of objections on the part of the defendant.

First, it was objected that an action on the case would not lie for a duty, in which the plaintiffs claimed an inheritance.

Secondly, That the prescription itself, as declared of and found in this special verdict, is not a legal prescription but void in law.

Thirdly, That though the prescription be taken to be good, and that the plaintiffs might have been entitled to a duty before the making of the statute 10 & 11 W. 3. that they are not now entitled to it, it being by that statute enacted that all his Majesty's subjects should have a free passage for navigating on the said river without any obstruction whatsoever, and there being no saving thereof for the mayor and burgesses of *Nottingham*.

I shall begin with the second objection, because if it prevail there will be no occasion to say any thing of either of the two others. And we are all of opinion that this is a good objection, and that the prescription as declared of and found is not a good and legal prescription.

It is said that the river *Trent* in and throughout the manor hath been time out of mind a navigable river, and consequently every subject of *England* hath always had a right to navigate on this river as much as he has to travel on the common highway. And as the toll is demanded for nothing else but navigating on the river *Trent*, it must be considered as toll thorough; and a difference has always been taken between toll thorough and toll traverse. It has been holden several times, and by the best authorities, that toll thorough cannot be supported without a consideration, but toll traverse may, because it in itself implies a consideration. In the book of assize 22 Ed. 3. 58. it is expressly laid down as a rule that toll thorough is against common

(*a*) It appears that this verdict was twice argued; once on the 25th Jan. 1748 by *Byre* King's Serje. for the plaintiffs, and *Parker* King's Serje. for the defendant, and again on Saturday, Nov. 11th by *Belfield* Serje. for the former and *Stance* King's Serje. for the latter.

and common right, and cannot be supported by usage. It 1738.
 likewise holden in *Keilw.* 148, 9. that such toll is not
 able without some particular consideration. It is said *The Mayor*
Lam. 232. that the King cannot grant toll thorough- &c. of Not-
 ough through a highway, for that it is an oppression TINGHAM
 : people, for that every highway shall be common to against
 one. In 1 *Vent.* 71., in the case of the city of Nor- LAMBERT.
 such custom was holden to be illegal and unreasona-
 nels for such vessels as unloaded at the quay there.
 eral books it is called *malum tolnetum*, or an outra-
 toll, and an oppression on all the subjects of *England*.
 sorts of tolls are condemned in *Magna Charta*, c. 30.,
 y statute *Westm.* 1. (a), c. 31., where it is said that
 one take outrageous tolls contrary to the common
 the realm, if it be in a vill of the King's, the King
 ke away the franchise.

I this distinction is supported by reason as well as
 ity. For how can a duty be imposed on all the sub-
 f *England* only for enjoying that privilege which is
 nherent birthright, and which every subject had a
 o before? If indeed they receive any particular be-
 as going over a bridge, coming into a quay, wharf,
 b), or the like, this indeed may alter the case: but
 is must be particularly shewn.

e cases have been cited to the contrary; but when
 into they either stand on some particular reason
 plainly distinguishes them from the common case; or
 nly said obiter that such tolls may be supported by
 ption without any consideration: but the reasons
 for it are such as make such dicta of no weight or
 ity. In the case of 21 *Hen.* 7. fo. 16., the first case
 is cited to this purpose, this point was not at all con-
 , but other objections were taken to the declaration
 t taking any notice of this; so that it is no authority

The case of *Smith and Shepherd*, which was prin-
 relied on on the part of the plaintiffs, as it is report-
Cro. Eliz. 711., is very imperfectly stated: but if

Edm. 1. c. 31.

the *Mayor of Tarmouth v. Eaton*, 3 *Burr.* 1402. where the plain-
 ned a prescriptive right to a duty or toll, called *measurage*, for
 ported from the port of *Tarmouth*, the Court said that the claim
 i consideration.


1738. that report deserve any credit, the Judges there were much divided, and they did not give any final judgment on this point. And as the case is reported in *Moor v. The Mayor & Co of Nottingham* and much better than in *Croke*, it is an express authority against this toll. For it is there said that this toll was insisted on by the defendant in his plea was adjudged to be bad, for that a man cannot prescribe to have toll for passing in the King's highway (a), for that it is the inconvenience for every man to pass on the King's highway, which is prior to all prescriptions; and that therefore if a man will plead such a prescription he must shew a reasonable cause for its commencement which is not to be presumed.

LAMBERT.

It is said indeed in some books, and particularly in the case of *James and Johnson*, 1 *Mod.* 232., that if the prescription be found (as it is in the present case,) it must be presumed to have a reasonable commencement: but this is laid down generally without consideration and without distinguishing the nature of the case. For though this may be true sometimes in the case of a private right, it is wholly otherwise in the case of a public right, to which all subjects of *England* are entitled. For if a reasonable commencement be presumed, it must be that it began by agreement, and that such agreement being so long ago cannot now be proved; which may be well enough in the case of a private right. But who could agree for all the subjects in *England*? They cannot consent to part with their rights, nor can they be deprived of their rights, any otherwise than by act of parliament, in which the consent of every subject is implied. This distinction is obvious and founded on good sense.

In several of the cases cited there is a particular bearing to the subject, as coming into a wharf, coming into a port or landing on the plaintiff's manor or quay, which distinguishes it from toll thorough. So are the cases 1

(a) Accordingly it has since been ruled that a prescription to take toll for passing through the streets of *Gainborough*, in consideration of repairs "divers and many streets in the town of G.", is bad, because that was no consideration for taking toll in the streets not so repaired. *Trotter v. Walgham*; 2 *Will.* 296.—But where the plaintiff, claiming a toll for passing over an highway, shewed that the liberty of passing over the soil, and taking the toll for such passage were both immemorial, and that the toll were before the time of legal memory in the same hands then severed since, it was presumed that the soil was originally granted to the public in consideration of the toll, and held that such original grant was a sufficient consideration to support the claim to the toll. *Lord Palmer v. Pickersgill*, 1 *Durnf. & E.* 660.

8; 3 *Lev.* 37, and 424 (a), and several other cases 1738. were cited. And there is a further reason to be given  the determination in 3 *Lev.* 37. that the duty there claimed by the city of London, whose customs and duties are all confirmed by act of parliament. In the *of Wilkes v. Kirby* (b), P. 12 W. 3. the duty was The Mayor &c of NOTTINGHAM against LAMBERT. fully laid to be paid erga reparationem pontus. It is therefore to adhere to the old rule, which is founded the best reason, that toll thorough cannot be maintained without a particular consideration shewn.

as said indeed in the present case that it is not found there was no consideration, but only that there was consideration proved: but de non apparentibus et de non tibus eadem est ratio. Besides this negative need have been found (c) at all; for though of late years negatives have been sometimes found, no such negatives were ever found in old special verdicts, except where necessary to shew that the person or thing did not within a particular exception; as in the present case proper to find that the defendant was not a burghers man; otherwise what was not found was always not to be proved. However this finding, that no ration was proved, makes the case still stronger, and is any presumption of a consideration. Besides the case is stronger against the plaintiffs than any that before; for it is not either laid or found that the defendants are lords of the manor or owners of the soil or the water so that for any thing that appears on the record before, another person may be lord of the manor and owner of the soil and water. So that there is not only no presumption any consideration for this toll, but the consequence might be, if it should be established, that the lord of the manor or the owner of the soil or water (if not a burghers freeman of Nottingham) might be obliged to pay a toll to mere strangers for navigating in his own manor, soil, or water, which would be most unreasonable and absurd. these reasons we are all clearly of opinion that this petition cannot be supported.

the same question has since received a similar determination on this *Colton v. Smith*, *Cowp* 47.

Lutw. 1519.

see Martin v. Jenkin, 2 *Str.* 1144; and 1 *Will.* 57.

It

1738. It is therefore unnecessary to say any thing on the other objections. The last on the act of parliament, be a question of great consequence and extent, as there are so many acts of parliament drawn in the like manner making rivers navigable; and it will be time enough to our opinions on it when it becomes a necessary question.

The Mayor
&c of NOT-
TINGHAM
against
LAMBERT.

Nor need we say any thing on the first objection, an action on the case will not lie for a duty, in which plaintiffs claim an inheritance. I will only say thus upon it, that though this might have been a doubt formerly, yet so many of these actions have been brought, & so many like actions in cases of the like nature, when was formerly holden that an assize only lay or an action debt, that it seems to be now too late to insist on this objection (a).

But there is no occasion for entering more minutely on it, we being all of opinion that, for the second objection judgment must be for the defendant."

(a) A general indebitatus assumpsit will lie for tolls; the Mayor of Exeter v. Trimlet, 2 Wils. 95; and Seward v. Baker; 1 D. & E. 616; for fines due to the lord on the admission of a copyholder; the Duke of Devonshire v. Cradock, H. 27 Geo. 2 C. B.; Evelyn v. Clibbster; 3 D. 1717; Grant v. Ayle, Dougl. 722; and Whitfield v. Hunt; ib. in note 8;—or for the profits of an office; Boyter v. Dodsworth, 6 D. & E. 681.

M. 12 G. 2.
Saturday,
Nov. 25th.

THOMAS KETTLE against THOMAS BROMSALL.

[T. 11 & 12 GEO. 2. Rol. 1697.]

Trover and detinue cannot be joined in the same action. **WILLES** Lord Chief Justice gave the opinion of the Court as follows;

"Detinue. The plaintiff declares in the first count that he was possessed of a handle of a knife with an old English description purporting it to be a deed of gift to the monastery of St. Albans, a ring with an antique stone with one of the *Cæsars'* heads upon it in basso relievo, and of several other things of the like nature, particularly specified in the declaration, and laid together to be of the value of 500*l.* as plaintiff to deliver &c.

—Detinue

will lie for goods lost and found as well as for goods delivered &c.

—If goods be delivered by A. to B. to keep safely, B. is answerable for them to the plaintiff though he be robbed of them—Secus if they be delivered to B. to keep as his goods &c.

own proper goods ; and that being so possessed he casually lost the same, and that afterwards by finding they came to the hands and possession of the defendant, by reason whereof an action accrued to the plaintiff to demand the same of the defendant.

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KETTLE
against
BROMSALL.

In the second count he declares that he delivered to the defendant the same things, specifying them again, of the value together of 500*l.* to be *safely kept* and to be delivered to the plaintiff when required ; that nevertheless the defendant, though often requested, has not delivered the same or any part thereof to the plaintiff, but refused and still doth refuse to deliver the same and unjustly detains them ; to the plaintiff's damage 1000*l.*

The defendant pleads that the plaintiff delivered to him the said goods and chattels *to take care of them as his own proper goods*, and to shew them to any person or persons to know the value of them ; and that the defendant, having the said goods and chattels in his pocket to shew them to any persons as were likely to tell him the value of the same, the said goods and chattels were feloniously taken from him by some person unknown to him without his wilful default or privy ; and this he is ready to verify, therefore he prays judgment whether &c.

The plaintiff replies that he did not deliver to the defendant the said chattels in the declaration mentioned to take care of them as his own proper chattels, or to shew them to any person or persons to know the value of them, as the defendant by his said plea hath alledged ; and concludes to the contrary.

The defendant demurs ; and for causes of demurrer shews that the plaintiff doth not by his replication fully answer to the matter in bar above pleaded, and that the said replication concludes to issue when it ought to have concluded with an amendment, and thereby have given the defendant an opportunity to rejoin, and to have put the whole matter in issue direct affirmative and negative.

The plaintiff joins in demurrer.

Serjt. Comyns for the defendant took three objections (a) ; two to the declaration, and one to the replication.

(b) The case was argued November 8th, 1738, by Comyns Serjt. in support of the demurrer, and by Agar Serjt. contra.

1st,

1738. 1st, That the writ is for 1000*l.* and the goods are laid in the declaration to be but of the value 500*l.* But there is not the least colour for this objection; for there are two counts, and the goods in each are laid to be of the value of 500*l.* and the damage at 1000*l.*

KEYTLE
against
FROMBALL.

2dly, That the first count is in trover, and the second in detinue; and that trover and detinue cannot be joined. That if the first be taken to be in trover, there is no conversion; and if in detinue, there is no demand; and consequently that it cannot be good in either. To shew that trover and detinue cannot be joined he cited 8 Co. 87. *Buckmer's case*; because they require different pleas (a).

But we are all of opinion that this objection will not hold; for that both counts are in detinue. Detinue will lie for things lost and found as well as for things delivered; for it is expressly laid down in *Fitz. N. B.* tit. "*Detinue*" (E) a book of the greatest authority (b). It was so also held as long ago as the 27 (c) and 34 *Hen. 8.* and there are several cases to the same purport in *Gliffon* and *Gulston*. tit. "*Detinue*"; a book of good credit. There are likewise several precedents of this sort in *Townsend's Tables*, tit. "*Detinue*"; a book of very good authority. And it would be very absurd if it were otherwise; for if so, a person might be greatly injured, and have no adequate remedy. For in trover only damages can be recovered; but the things lost may be of that sort, as medals, pictures, or other pieces of antiquity, (and this seems to be the present case,) that no damages can be an adequate satisfaction, but the party may desire to recover the things themselves, which can only be done in detinue.

So that taking it for granted (which I believe is so) that trover and detinue cannot be joined, yet this objection will be of no weight in the present case; and this likewise will answer the other part of the objection; for though there be no request or conversion laid in the first count, yet there is

(a) Not only the *pleas*, but the *judgments* also, are different; in trover only damages can be recovered, but in detinue the things themselves, or their value, may be recovered. And two counts cannot be joined in the same declaration, unless the same judgment may be given on both. *Brown v. Dixon*, 1 *Durnf. & E.* 276. See also *Gilb. Hist. C. B.* 6, 7.

(b) *Fitz. N. B.* 304.—*Vid. Co. Lit.* 286. b. accord.

(c) 27 *Hen.* 8, 13.

request laid in the last count, and if one of the counts be
 the general demurrer to both will not hold.

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Thirdly, The last objection is to the replication, which as
 signed as a cause of demurrer is scarcely intelligible; and
 we are of opinion also that this is of no weight. When a
 plea is pleaded, the plaintiff may certainly deny it and join
 issue upon it. He must indeed join issue on a material part
 of the plea; and so he has done here, for he has joined issue
 on the only part of it that is material. For according to
Southcote's case, 4 Co. 83, 84., the case of *Coggs v. Barnard*
 and several other cases, if the goods were delivered to
 the defendant and kept safely, though the defendant had been robbed of
 them, detinue will lie against him; for he must take his
 remedy against the thief or the hundred as he can. But if
 the goods were delivered to the defendant to take care of
 them as his own proper goods (b) &c., if he be robbed of
 them, that is a good plea. The only material part therefore
 of this plea is whether the goods in the declaration were
 delivered to the defendant only to take care of them as
 his own &c.; and this fact the plaintiff hath traversed.

As therefore we are of opinion that the objections would
 not hold either to the declaration or the replication, judg-
 ment was given for the plaintiff."

a) 1 *Ld. Raym.* 909; *Com. Rep.* 133; *Salk.* 26; in which part of the
 case in *Southcote's* case was denied to be law.

b) Though even in such case the defendant is answerable for damage
 arising from his gross negligence *Mylton v. Cock*, 2. *Str.* 1099.

1738.

RICHARD MORSE *against* **GEORGE JAMES, WILLIAM SYMONDS, PHILIP ELLY and CHRISTOPHER CATER** (a).
 M. 12 G. 2.
 Tuesday,
 Nov. 28th,

THE opinion of the Court was thus delivered by **Willes**, Lord Chief Justice. "Trespass. The plaintiff declares that the defendants took drove and led away six oxen and four mares of the plaintiff's and detained the same the space of two days, and until the plaintiff paid to the defendants 19*l.* 10*s.* for the redemption of the said oxen damage 40*l.*

The defendants, as to all the trespasss, except the taking and driving and leading away the six oxen and four mares detaining them two days, plead not guilty; and as to three of them *George Philip* and *Christopher* plead a special justification; that in and for the *Forest of Dean* in county of *Gloucester* there is, and time out of mind has been, a court of record of our lord the King and his decessors Kings and Queens of *England*, commonly called the Mine Law Court, for the trial and determining of all personal actions and pleas personal arising accordin

An officer of an inferior court may justify acting under process which is only voidable, but not under void process—Errors in process in inferior courts cannot be amended under stat. 8 Hen. 6. c. 12, and 15—Officers justified under a precept stated to bear date 26th February issuing out of a court held 24th February; held that the process was void, as justification bad.

—A sheriff, who justifies under a returnable writ, must shew it returned, though bailiffs need not.

—Whether it be not necessary for the officer of an inferior court, to whom its process are directed, to shew a precept, under which he justifies, returned? Qu.

—If in such case he do not, but rely merely on the precept itself, whether it be satisfactory for him to conclude the plea prout patet per recordum? Qu.

—But if he do shew the return as well as the precept, the plea must so conclude.

—When an officer of an inferior court justifies under a precept to take the goods of *A. B.* in execution, the precept and return are not merely inducement but of the substance of the justification.

—Though an officer is justified in acting under erroneous process, it must be in a court where the court, out of which it is issued, had jurisdiction.

—Defendant justified as an officer of an inferior court for trying &c causes touching mines and miners within a certain district; the plea was holden bad because it did allege that the defendant below was a miner "at the commencement of the suit but only "when the execution issued."

—If the plaintiff in an action in an inferior court, or a mere stranger, justify process, he must set forth the proceedings at length, otherwise the plea is bad not as it respects him but the officers of the court also who join with him in the plea.

—Whether a person, who acts at the request of the officers and in their aid, in executing civil process of an inferior court, be such a stranger? Qu.

—Plea of justification under the process of an inferior court holden "at the forest of *D.*" which contains many thousand acres, without stating in what particular part forest good; sensu.

(a) 7 *Mod.* 245. oct. ed. S. C.—This is said, in the Prothonotary Douquet Roll, to be entered *Hil.* 11 *Geo.* 2. *Roll* 318, and 319; but searching it appears that the Roll was never carried in. The transcript of the record is however in *Tr.* 13 & 14 *Geo.* 2. *Rel.* 34. *B. R.*

happening within the said forest and jurisdiction of the court and touching the mines and miners thereof there and to be held in the said forest on *Tuesday* in every night. That the court is and time out of mind hath been held before the constable of the castle of *St. Bri- tain* in the said county or his deputy or deputies; and that at the time when &c. at a court of record of our said King held at the said *Forest of Dean* in the county of *Gloucester* within the jurisdiction of the said court according to the custom of the said court time out of mind used and observed on *Tuesday the 24th of February 1735*, before *Mr. Pyke* Esquire deputy to *Earl Berkeley* constable of the said castle and then steward of the said court, there was issued out of the said court a certain precept under the seal of the said court bearing date *26th of February* in the same year directed to the deputy gaveller of the mines of his Majesty's said *Forest of Dean* and also to the said *Philip* (he being then and there and until the return of the said precept being duty gaveller of the said mines and an officer of the said court for that purpose, and the said *Philip* being then and there and until the return of the said precept an officer of the said court for this purpose,) by which the said *George* and *Philip* were commanded to levy the goods of the plaintiff then one of the said miners, if goods should be found within the liberties of the said forest and jurisdiction of the said court, the sum of *25l.* for which the said *William Symonds* then one of the said miners recovered against him by judgment of the same court a writ of debt, being for a cause of action arising within the jurisdiction of the same court, and that they should have paid the said *25l.* at the then next court to satisfy the said debt; the said precept before the return, namely, on the *2d of February 1735*, was by the said *William Symonds* delivered to the said *George* and *Philip* to be by them executed in due form; by virtue of which precept the said *George* and *Philip* officers of the said court, and the said *Christopher* as servant, and at their request and in their aid and assistance, arrived and before the return thereof, viz. on the said *March 1735* at *Yorkly* within the jurisdiction of the said court took drove and led away the said six oxen and horses there in execution for the debt aforesaid, and kept them for two days and until they had levied the said *5l.* so recovered; as it was lawful &c. and the said

1738.

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against
JAMES.

George

1738.

M. 2 G. 2.
Tuesday,
Nov. 28th,

RICHARD MORSE *against* GEORGE JAMES, WILLIAM SYMONDS, PHILIP ELLY and CHRISTOPHER CARTER (a).

THE opinion of the Court was thus delivered by *Willes*, Lord Chief Justice. "Trespass. The plaintiff declares that the defendants took and drove and led away six oxen and four mares of the plaintiff's and detained the same for the space of two days, and until the plaintiff paid to the defendants 19*l.* 10*s.* for the redemption of the said cattle, damage 40*l.*

The defendants, as to all the trespasss, except the taking and driving and leading away the six oxen and four mares, and as to detaining them two days, plead not guilty; and as to three of them *George Philip* and *Christopher* plead a special justification; that in and for the *Forest of Dean* in the county of *Gloucester* there is, and time out of mind has been, a court of record of our lord the King and his predecessors Kings and Queens of *England*, commonly called the Mine Law Court, for the trial and determination of all personal actions and pleas personal arising accruing or issuing out of a court held 24th February; held that the process was void, and a justification bad.

—A Sheriff, who justifies under a returnable writ, must shew it returned, though bailiffs need not.

—Whether it be not necessary for the officer of an inferior court, to whom its process are directed, to shew a precept, under which he justifies, returned? *Qu.*

—If in such case he do not, but rely merely on the precept itself, whether it be necessary for him to conclude the plea *prout patet per recordum*? *Qu.*

—But if he do shew the return as well as the precept, the plea must so conclude.

—When an officer of an inferior court justifies under a precept to take the goods of *A. B.* in execution, the precept and return are not merely inducement but of the substance of the justification.

—Though an officer is justified in acting under erroneous process, it must be in a court where the court, out of which it is issued, had jurisdiction.

—Defendant justified as an officer of an inferior court for trying &c causes touching mines and miners within a certain district; the plea was holden bad because it did not allege that the defendant below was a miner "at the commencement of the suit below but only "when the execution issued."

—If the plaintiff in an action in an inferior court, or a mere stranger, justify under process, he must set forth the proceedings at length, otherwise the plea is bad not as it respects him but the officers of the court also who join with him in the plea.

—Whether a person, who acts at the request of the officers and in their aid, in executing civil process of an inferior court, be such a stranger? *Qu.*

—Plea of justification under the process of an inferior court holden "at the forest of *D.*" which contains many thousand acres, without stating in what particular part of the forest good; *sembl.*

(a) 7 *Moul.* 245. *oct. ed.* S. C.—This is said, in the Prothonotary Docquet Roll, to be entered *Hil. 11 Geo. 2. Roll* 318, and 319; but searching it appears that the Roll was never carried in. The transcript of the record is however in *Tr. 13 & 14 Geo. 2. Rel.* 34. B. R.

precept, and consequently even the officers of the court
 did not justify under it.

1st, That they ought to have concluded their plea *prout
 per recordum*. That this is necessary as to the precept
 1st; but if not, certainly so as to the return.

2^d, That it does not appear that this precept issued in a
 place wherein the court had a jurisdiction.

3^d, That *Christopher Carter* being a stranger, and not
 officer of the court, ought to have set forth the proceed-
 ings at large; and that if the plea is bad as to him, the other
 defendants having joined in the plea along with
 their plea likewise must be bad.

4th, That it ought to have been shewn at what place in
 regular the court was held; and that saying it was held in
 West, which contains at least 30,000 acres, is not suf-
 ficient.

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 against
 JAMES,

As to the first objection; it depends entirely on this, whe-
 ther the precept were void or only voidable; if voidable, the
 court might justify under it; if void, they could not. It
 is certainly void, if it be not amendable. The question
 therefore is, Whether amendable or not? If it be amendable
 it must be so by the stat. 8 H. 6. c. 12. and 15. And
 for this purpose the counsel for the defendants cited several
 statutes; but the words of these statutes plainly do not extend
 to inferior courts. For they only say *the King's Judges*, and
the King's Justices, may amend; which words have always
 been construed not to include the Judges of these inferior
 courts. The cases cited out of *Cro. Jac. (a)*, *Cro. Car. (b)*,
1 Jones (c), and several other books, are all of amend-
 ments by the courts of *Westminster-Hall*, and there was no
 objection cited, nor can I find any, of such amendments made
 in inferior courts (d). We are therefore of opinion that this
 objection is not fatal.

As

Vid. *Dolphin v. Clerk*, *Cro. Jac.* 64; and *Comyn v. Kyneto*, *ib.* 162.

Vid. *Aylmerworth v. Chadwell*, *Cro. Car.* 38.

Vid. *Smith v. Harvard* Sir T. 41.

There seems to be some confusion in the books respecting the opera-
 tion of these two statutes and the other statutes of amendment and justifica-
 tion. It is evidently a distinction in the penning of the different statutes on
 the subject; some speaking of the superior courts, others extending to in-
 ferior courts of record. The statutes 8 Hen. 6. c. 12. and c. 15, speak of
 "the King's Judges" "The King's Justices", and "The said Courts (1)
 King." The stat. 16. and 17 Car. 2. c. 8. is expressly confined

Which mean the superior courts at *Westminster*. *Dyer* 236, a; *Moor*
and Styles 340.

to

1738.

RICHARD MORSE *against* **GEORGE JAMES, WILLIAM SYMONDS, PHILIP ELLY and CHRISTOPHER CATER** (a).

M. 2 G. 2.
Tuesday,
Nov. 28th,

THE opinion of the Court was thus delivered by **Willes**, Lord Chief Justice. "Trespass. The plaintiff declares that the defendants took drove and led away six oxen and four mares of the plaintiff's and detained the same the space of two days, and until the plaintiff paid to the defendants 19l. 10s. for the redemption of the said cattle damage 40l.

The defendants, as to all the trespasss, except the taking driving and leading away the six oxen and four mares and detaining them two days, plead not guilty; and as to three of them *George Philip* and *Christopher* plead a special justification; that in and for the *Forest of Dean* in the county of *Gloucester* there is, and time out of mind has been, a court of record of our lord the King and his predecessors Kings and Queens of *England*, commonly called the Mine Law Court, for the trial and determination of all personal actions and pleas personal arising accruing issuing out of a court held 24th February; held that the process was void, and justification bad.

—A Sheriff, who justifies under a returnable writ, must shew it returned, though bailiffs need not.

—Whether it be not necessary for the officer of an inferior court, to whom its precepts are directed, to shew a precept, under which he justifies, returned? Qu.

—If in such case he do not, but rely merely on the precept itself, whether it be necessary for him to conclude the plea *prout patet per recordum*? Qu.

—But if he do shew the return as well as the precept, the plea must so conclude.

—When an officer of an inferior court justifies under a precept to take the goods of *A. B.* in execution, the precept and return are not merely inducement but of the substance of the justification.

—I though an officer is justified in acting under erroneous process, it must be in a where the court, out of which it is issued, had jurisdiction.

—Defendant justified as an officer of an inferior court for trying &c causes touch mines and miners within a certain district; the plea was holden bad because it did allege that the defendant below was a miner "at the commencement of the suit begun but only "when the execution issued."

—If the plaintiff in an action in an inferior court, or a mere stranger, justify in process, he must set forth the proceedings at length, otherwise the plea is bad notwithstanding as it respects him but the officers of the court also who join with him in the plea.

—Whether a person, who acts at the request of the officers and in their aid, in executing civil process of an inferior court, be such a stranger? Qu.

—Plea of justification under the process of an inferior court holden "at the forest of *D.*" which contains many thousand acres, without stating in what particular part of forest good; *semble*.

(a) 7 *M. d.* 24r. oct. ed. S. C.—This is said, in the Prothonotary Doquet Roll, to be entered *Hil. 11 Geo. 2. Roll* 318, and 319; but searching it appears that the Roll was never carried in. The transcript the record is however in *Tr. 13 & 14 Geo. 2. Rel. 3A. B. R.*

was returned, but his bailiff or officer need not : and so he expressly laid down in the case of *Briton v. Cole*, *Salk.* 659. But whether or no these officers must be considered in the foot of the sheriff, as being the immediate officers to whom the Court directs the precept (a), (as was insisted on by my Brother *Eyre*) we need not determine at present, because the defendants have actually taken upon them to set out the return in this case.

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against
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It was said that the precept and return in this case are only inducement to the justification ; and where a matter of record is insisted on only by way of inducement, the plaintiff or defendant who insists upon it need not conclude prout patet per recordum. And several cases were cited to this purpose, particularly the case of *Waites v. Briggs* reported in 2 *Salk.* 65. and 5 *Mod.* 8 (b). We admit the rule, but we think that in the present case there is no colour to say that the precept and return are only matter of inducement ; they are the very substance of the plea, and the only matter that is insisted on by the defendants for their justification. In the case of *Waites v. Briggs*, which was an action of debt on an escape, the judgment and execution might with some propriety be said to be only inducement, the escape being the substance of the action : but it is impossible to think that my Lord Ch. Just. *Holt* should say what he is reported to have said obiter in that case ; “ In an action of debt on a judgment the judgment is only inducement, and therefore the plaintiff need not conclude prout patet per recordum. If the judgment indeed be only matter of inducement in an action of debt on the judgment, then the precept in this case may be only inducement ; nay it will be impossible that a record can be insisted on in any case whatsoever but it must be by way of inducement. But this must be the mistake of the reporter (c), for Lord *Holt* could not say so absurd a thing.

(a) If this had been only a writ on mesne process, it seems that these officers should have shewn that it was returned, *Kirke v. Atkins*, *Tr.* 14 *Car.*, *Ed. Abr.* 563. pl. 18 ; and *Freeman v. Blewett*, 1 *Ld. Raym.* 634 ; in the case of which this reason is given, “ Que il mesme est l'officier que doit ceo retourner, et est come viscount deins cest jurisdiction.”

(b) 1 *Ld. Raym.* 35, S. C.

(c) And this is not mentioned in the report of the case in *Salkeld* or Lord

1738.

RICHARD MORSE *against* **GEORGE JAMES, WILLIAM SYMONDS, PHILIP ELLY and CHRISTOPHER CATER** (a).

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—If in such case he do not, but rely merely on the precept itself, whether it be necessary for him to conclude the plea prout patet per recordum? Qu.

—But if he do shew the return as well as the precept, the plea must so conclude.

—When an officer of an inferior court justifies under a precept to take the goods of **A. B.** in execution, the precept and return are not merely inducement but of the substance of the justification.

—Though an officer is justified in acting under erroneous process, it must be in a court where the court, out of which it is issued, had jurisdiction.

—Defendant justified as an officer of an inferior court for trying &c causes touching mines and miners within a certain district; the plea was holden bad because it did allege that the defendant below was a miner "at the commencement of the suit begun but only "when the execution issued."

—If the plaintiff in an action in an inferior court, or a mere stranger, justify under process, he must set forth the proceedings at length, otherwise the plea is bad not only as it respects him but the officers of the court also who join with him in the plea.

—Whether a person, who acts at the request of the officers and in their aid, in executing *civil* process of an inferior court, be such a stranger? Qu.

—Plea of justification under the process of an inferior court holden "at the forest of **D.**" which contains many thousand acres, without stating in what particular part of the forest good; semel.

(a) 7 *Mod.* 247. oct. ed. S. C.—This is said, in the Prothonotary Douquet Roll, to be entered *Hil. 11 Geo. 2. Roll* 318, and 319; but searching it appears that the Roll was never carried in. The transcript of the record is however in *Tr. 13 & 14 Geo. 2. Rol.* 34. B. R.

It is said in the case of *Briton v. Cole* before cited that the court seemed to hold "that if one come in the aid of the sheriff and at his request he may justify as the officer himself may do." But if this be understood generally, I doubt whether this be law; for a distinction (I think) ought to be made between an officer who executes a civil process and a peace officer who may command any one to assist him. But however, as there is no occasion, we give no opinion at present on this point.

We need we give any opinion on the fifth objection, that it is not particularly alleged where the court was holden &c: we are rather inclined to be of opinion that it is well enough as it is, and that there was no occasion to set forth a particular place in the forest where the court was holden. Yet, by reason of the three first objections, we are all of opinion that judgment ought to be for the plaintiff."

1738.

M RSE
against
JAMES.

ESTIA HODGSKIN, THOMAS HODGSKIN, and RICHARD PICKWORTH, *against* JOHN QUEENBOROUGH.

M. 12 G. 2.
Thursday,
Nov. 16th.

COVENANT. The plaintiffs set forth an indenture between the plaintiffs and one *Priscilla Brown* demised and the defendant, dated the 1st of *May* 1721, where the plaintiffs and the said *Priscilla* demised to the defendant several barns out-houses stables and other buildings, and amongst the rest a kiln, and several parcels of land with the appurtenances, to hold from the 25th of *March* then past for the term of fifteen years under the rent of 13*l.* per annum payable at *Michaelmas* and *Lady-day*; and the defendant covenanted to keep all and singular the premises in repair and to leave them so at the end or sooner determination of the term.

If, to covenant for not repairing certain premises demised, the defendant plead that the plaintiff before the cause of action accrued entered and pulled down the premises and expelled him, the plaintiff may reply that he did not expel &c modo et forma &c. --- But to an action of covenant for not repair-

The plaintiffs then set forth that the defendant entered by virtue of the said indenture and was possessed of the premises, and that whilst he was so possessed and during the continuance of the said demise, *viz.*, on the 1st of *February* 1735 he permitted and suffered the cowhouse and barn to fall out of repair and several other parts of the buildings and several premises the defendant cannot plead an expulsion by the plaintiff from part.

1738. the kiln in particular, (particularly specifying the bu
 and the repairs that were wanting,) and that he per
 HODGSKIN and suffered all the said buildings before specified to :
 against and continue so out of repair to the end and expira
 QUEEN- the said term, and left the same so out of repair; ex
 BOROUGH. to his covenant &c!

The defendant pleaded to the whole declaration t
 fore the suffering any of the said premises to be so out
 pair as in the declaration mentioned and before the fa
 of February 1735, viz. on the 1st of May 1730 the
 tiff *Letitia* entered into the said kiln parcel of the sai
 mises so demised and a great part thereof, to wit, on
 part thereof pulled down and him the said defendant
 the said kiln and from the use occupation and pos
 thereof expelled and amoved and the said defendant
 pelled and amoved from thence to the end and expira
 the said term held out &c; and this he is ready to veri

The plaintiffs replied that the said *Letitia* did not
 amove and hold out the said defendant from the said ki
 from the use occupation and possession thereof in n
 and form as the said defendant hath above alleged;
 cluding to the country.

The defendant demurred, and shewed for cause
 murrer that the plaintiffs by their replication put in
 matters not issuable or triable by a jury, and that the
 cation was insufficient &c (a).

Judgment (b) for the plain

(a) The case was argued by *Booth* Serjt. for the defendant, and
 Serjt for the plaintiffs. The former contended that the entry and
 down were the material parts of the plea; and should therefore hav
 traversed; and that the matter denied, the expulsion, was only a
 sion of law from the entry &c. And he cited 1 *Rep. Abr.* 940. a.
Cberburne v Rye, Cro. Eliz. 341; *Cibell v. Hill*, 1 Leon. 110; 11 *R.*
Allen v. Reeve, cited in *Hardr.* 70.; *Raft.* 175. b.; *Robins. Est.*
Brownl Entr. 60. pl. 115; and *Carith v. Read. Moor* 474. For th
 tiff were cited *Reynolds v. Buckle*, *Hab.* 326; *Roper v. Lloyd*, *Sir* 1
 148; and *Barker v. Fletwell*, *Godb.* 70.

(b) The reasons given by the Court do not appear in Lord
Willes's note book; the following note is taken from Mr. Just. W. *Re*
 book—

"*Willes*, 1d Ch. Just.—This is an action of covenant on s
 in which the defendant covenants to keep certain premises, of wh
 kiln is one, in repair; the breach is for not repairing a great man
 as well as the kiln. The defendant pleads one plea to the whole, wh

plaintiffs entered into the kiln and expelled the defendant from the occupation thereof. The plaintiffs reply that the defendant did not expel him in manner and form. Now this is certainly a matter triable; if every entry and pulling down be an expulsion, the expulsion is variable; modo & forma put the whole in issue. A man is only obliged to traverse a material part of the plea; the expulsion here is the only material; neither the entry or pulling down is an expulsion (1) If he is not repairing the kiln only, it might have been an excuse; it is pleaded, the plea is no answer to the declaration; and the result is good.

1738.

HODGSKIN
against
QUEEN-
BOROUGH.

Other Judges were also of the same opinion."

In *Taylor v. Cole*, 3 Durnf. & East. 292, (the judgment in which case affirmed in the Exchequer-Chamber on error, 1 H. Bl. Rep. 555.) it is held that in trespass for breaking and entering the plaintiff's house and expelling him therefrom the breaking and entering are the gist of the action, and the expulsion only matter of aggravation; that therefore a declaration as to the breaking and entering covered the whole declaration, and that, if the plaintiff meant to insist on the expulsion as making the defendant a trespasser ab initio, he should insist on that by a replication for assignment.

WILLIAM EATON against ROBERT SOUTHBY.

[T. 10 & 11 Geo 2. Rol. 2301, 2.]

THE opinion of the Court was thus given by

Chief Justice. "Replevin for seventy cocks or sheep of wheat taken 31st July 1736.

The defendant avows taking them because the locus in question contains ten acres of land, and that before the taking, to wit, 20th April 1736 the defendant was seised of a messuage one hundred and one acres of land, of which the said ten were parcel, in fee; and that being so seised before the taking, &c., to wit, the same day and year he demised the

messuage left on the ground until it was fit in a course of husbandry to be used, without saying how long it remained there; the reasonableness of the time is a question of fact for the jury, and not a question of law for the Court. The goods are bound by the delivery of the fieri facias to the sheriff; and therefore he executes the writ notwithstanding the death of the party afterwards and before the return of it.

The estate of a tenant at will be determined either by his death or by the act of the landlord, he or his executors may reap the corn sown by him.

And therefore the corn sown by a tenant at will (who died before harvest) and purchased by another person cannot be distrained by the landlord for rent due to him from the tenant.

Whether goods taken in execution can be distrained for rent? *Qu.*

Whether an action be real or personal depends on the thing to be recovered by it, or on the nature of the defence; and therefore a replevin is a personal action, the title to land be brought in question.

1 Mod. 251. 8vo. edit. S. C.

K 2

131

Hil. 12 G. 2.
Saturday,
Feb. 10th.

Pleading that A. having been lawfully possessed &c. as tenant at will to B., is a sufficient averment that A. was tenant at will &c.—Pleading that corn which had

been carried is

1738,9. said tenements to *Thomas Dunby* to hold from thence for one year at the rent of 125*l.* a-year payable quarterly, the payment to be made on the 21st of *July* next; that by the said demise the said *T. Dunby* entered and was possessed; and because 3*l.* 5*s.* of the said rent for one quarter on the said 21st of *July* was in arrear he distrained the said cocks or shocks, being on the premises, for the said rent.

EATON
against
SOUTHEY.

The plaintiff pleads in bar to the avowry that before the time when &c. to wit, *H. 9 Geo. 2.* one *Henry Lass* recovered a judgment in *B. C.* against one *G. Sanders* debt of 200*l.* and 50*s.* damages; and that afterwards, to wit, on the 12th of *February 9 Geo. 2.* a fieri facias issued from the said court directed to the sheriff of *Oxfordshire* to levy the said debt and damages on the goods of the said *G. Sanders* which writ was returnable *crastino Ascensionis*. And the plaintiff further pleads that afterwards, to wit, 22d *March* following the said writ was delivered to the sheriff of *Oxfordshire* to be executed, and afterwards the said *G. Sanders* and afterwards and before the said time when &c. viz. 1st of *April* then following seven acres of the premises had been sown with wheat by the said *G. Sanders* in his life and the said *G. Sanders* at the time of the said sowing had been lawfully possessed of the said place &c. as tenant to the said *Robert* (the defendant) and also at the time of the death, the said sheriff before the taking &c. to wit, 15th of *April* then next seized and took in execution by virtue of the said writ the said wheat so growing, and afterwards and before the time &c. viz. 23d of *April* sold the said wheat to the plaintiff in further execution of the said writ whereof the defendant then and before the time when he had notice; and that the plaintiff being so possessed and entitled did suffer the said wheat to grow on the place where it was sown until it was ripe and fit to be cut; and afterwards and before the time when &c. viz. 29th of *July* next the plaintiff entered into the premises in order to cut the wheat when it was ripe and fit to be cut, and did cut the same, and divided it into cocks or shocks, whereof the said seventy cocks or shocks were a parcel; and the said cocks or shocks being so cut, the plaintiff suffered the same to lie on the said seven acres until the same in a course of husbandry was fit to be carried a

the said wheat being so cut and lying on the premises it was fit to be carried away according to the course of husbandry, the defendant of his own wrong took and disseised the same under pretence of a distress, the said wheat at the time of such distress not being fit to be carried away according to the course of husbandry. And the plaintiff avereth faith, that at the time of the said distress there were other goods on the premises sufficient to answer the value of the said rent; and avers the identity of the wheat, and prays judgment.

1738,9.

EATON
against
SOUTHEY.

To this plea the defendant demurs generally; and the plaintiff joins in demurrer.

And several objections (a) were taken by the defendant to this plea.

1st, That it is not sufficiently set forth that *G. Sanders* was tenant at will to the defendant.

2^{dly}, That it ought to have been particularly shewn how the wheat remained on the land after the cutting, that the Court might judge whether it were a reasonable time or not.

3^{dly}, That, *G. Sanders* dying before the goods were taken by virtue of the fieri facias, the execution was not well executed, for that it could not be executed after the death of the party.

4^{thly}, That though the corn had been legally taken in execution, yet that it being suffered to remain on the land was liable to be distrained for rent.

As to the first objection; we are of opinion that it is sufficiently set forth in the plea that *G. Sanders* was tenant at will at the time of sowing the corn and also at the time of his death. If this indeed were otherwise, it would be an objection in substance and not form only, and consequently might be well taken advantage of on a general demurrer. For the whole merits of the plea depend on *G. Sanders's* being tenant at will &c; if he were not so, the whole plea is at an end. But pleas must be construed according to a common intent; and a man must strain indeed

(a) This case was twice argued; the first time on the 1st of May 1738 by *Be-field* Serjt. for the defendant, and *Wright* Serjt. for the plaintiff; and on the 29th of June 1738 by *Skinner* King's Serjt. for the former and *Bye* King's Serjt. for the latter.

1738,9. to say that this plea does not plainly intend that G. ^{San} was tenant at will. The word *as* tenant at will affords objection; it being the constant method of pleading that man was seised in his demesne *as of fee*. The other ^{Eaton} ^{ag. inf.} ^{Southey.} "having been" we think likewise well enough. The "being (a)" would have been the more common expression but as this part of the plea relates to the time past, we are of opinion that the words "having been" are more proper than the word "being."

As the distinction between real and personal actions, that a replevin is to be considered either as a real or personal action according as the defendant shall happen to avow, is laid down in *Finch's Law*, p. 316. (b), and in some other books, we think that it is a distinction that will appear upon examination to be without foundation. For an action either real or personal according as the thing to be recovered by that action is either real or personal; and as nothing that is real can be recovered by this action, be the recovery what it will, it cannot be considered as a real action. the nature of the defence would make a difference, action of trespass wherein the title of land is brought in question by the plea, and actions of debt for rent wherein the title of the land may come in question, nay even actions of debt on a bond against an heir where *riens per discent* pleaded, must be considered as real actions; which yet would be most absurd.

As to the second objection, that it ought to have been particularly set forth how long the corn lay on the land after it was cut, that the Court might judge whether it were a reasonable time or not; we think also that this objection will not hold. For though it is said in *Co Lit.* 56. b. that in some cases the Court must judge whether a thing be

(a) "Being" has been holden to be an averment even in criminal proceedings; *R. v. Moor*, 2 *Mod.* 118; *R. v. Boyall*, 2 *Burr.* 832; and *L. Bootie*, 2 *Burr.* 864. See *Mead v. Robinson*, M. 17 G. 2. post.

(b) It is observable of the two authorities, referred to by *Finch* in support of his opinion, that "a replevin for goods distrained which according to the nature of the plea ministered by the parties groweth to be either real or personal plea," that the first *F. N. B.* 155. to 160. is entirely silent on the subject, and the other 4 *H. 6.* 30. is only an argument of counsel *Cottimore* who used it not being appointed a Judge until 1430., which was five years after the 4 *Hen. 6.*

able or not, as in case of a reasonable fine, a reasonable price, and the like, it is absurd to say that in the present case the Court (a) must judge of the reasonableness; for if it ought to have been set forth in the plea not only how the corn lay on the ground, but likewise what sort of weather there was during that time, and many other incidents, which would be ridiculous to be inserted in a plea. We are of opinion therefore that this matter is sufficiently stated, and that the defendant might have traversed it if he had pleased; and then it would have come before a jury, who upon hearing the evidence would have been the proper judges of it.

1738,9.

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Thirdly; As to what we said that, the party's dying before the actual execution of the fieri facias by the sheriff, the sheriff could not take the corn after the death of *G. Sanders*, we are of opinion that the law is otherwise. As to what was said in answer by my Brother *Eyre* that it has been held generally that if the party die after the testè and before the return of the writ, the writ notwithstanding may be executed, we give no opinion for if *G. Sanders* had died before the writ had come to the hands of the sheriff (b), it might have admitted of some doubt. But we think that there is no doubt here, it being expressly alleged that the fieri facias was delivered to the sheriff before the death

(a) In *Metcalf v. Hall*, and *Appleton v. Sweetapple*, 12 G. 3. and 13 G. 3. B. R. where the question was what was a reasonable time in which a banker's check should be presented for payment in law. Some of the Judges said that "what was a reasonable time was a question of law;" and they wished the jury to consider a check presented at a reasonable time, if presented on the day next after that on which it was given: after four trials however the verdict of the jury prevailed, which it was decided that the plaintiffs had made the check their own, by presenting it on the day when it was given, the bankers stopping it the next day.

In a subsequent case, *Tisdal v. Brown*, 1 D. & E. 168. Lord Mansfield said "What is reasonable notice (by the holder of a bill of exchange to the drawer or indorser that it is dishonoured by the acceptor) is partly a question of fact and partly a question of law." So in *Bell v. Wardell*, E. 1. B. C. p. 8. where a custom was pleaded that the inhabitants of a town should walk or ride over certain closes of arable land at all reasonable times in the year, it was ruled that what was a reasonable time was partly a question of fact and partly of law.

(b) It appears from the case of *Bragner v. Langmead*, 7 Durnf. & E. 20. that in the cases there referred to, that the sheriff might have proceeded to execute the writ notwithstanding the death of the party before it came to the sheriff's hands; for the goods of a defendant were at common law taken from the testè of the writ, and the statute of frauds, 29 Car. 2. c. 3. which enacts that they shall only be bound from the delivery of the writ to the sheriff, only relates to purchasers, and not to the defendant himself.

of

1738,9. of *G. Sanders*; and consequently by the stat. 29 Car. 2. 3. s. 16. it bound the property of the goods from that time and therefore the sheriff might sell them afterwards whenever he pleased. The case (a) which was cited of a warrant to levy a poor's rate is in no wise like this; for the warrant is no lien on the goods of the party until it is actually executed:

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Fourthly; but the principal objection was whether goods being taken in execution could afterwards be distrained; and if the goods had been the goods of the new tenant *T. Dunby* and had been taken by virtue of an execution against him (which would have brought this point in question) it might have required very good consideration, it being a point of great consequence. That goods taken in execution, or even goods distrained damage feasant, are in the custody and under the protection of the law and therefore cannot be distrained for rent, is expressly holden in *Lit. 47. a.*, and several other books (b). And we are inclined to be of this opinion. But if it were necessary for us to give any positive resolution on this point, it would be more proper to consider whether the statute 2 W. & M. c. 1. and the stat. 8 An. c. 14., have made any alteration in this respect. But we think we have no occasion to enter further into this matter, because we are clearly of opinion that if there had been no execution in the present case, the corn could not be distrained.

The law is that, if the estate of a tenant at will be terminated either by his death or the act of his landlord, in the one case and his executors or administrators in the other shall reap what he has sown; and that the tenant or his representatives shall have free liberty of ingress and regress to come upon the land and to cut and carry away the corn. These are the express words of *L. sect. 68.* and it has been undoubted law ever since. And yet there will be an end of this law if the present distress can be maintained. For a landlord will have nothing to do but to determine the estate of his tenant at will as soon as he has sown all his corn, and then to let his land to another.

(a) *Wallis administrator v. Huett*, Hil. 5 G. 2. C. B.

(b) *Vid. Park. Rep.* 120. et seq.

ving rent upon a day before harvest; and then, as 1738, 9.
 present case, he may distrain the corn as soon as it is
 rice the stat. 2 *W. & M. c.* 5. he may now distrain
 se or in sheaves: but this is so absurd and contrary
 ion sense that but stating the case is sufficient to an-
 EATON
 against
 SOUTHEY.

And it was rightly observed by the counsel for the
 that a landlord in this case has no power to let the
 t subject to the same condition as he himself held it.
 t this, when it is considered, is the whole of the
 case.

are therefore all clearly of opinion that judgment must
 n for the plaintiff (a)."

A writ of error was afterwards brought in *B. R.* to reverse this judg-
 nd in *Mich.* 14 *Geo.* 2. two objections were taken by the counsel for
 niff in error; 1st, that though an estate in fee may be pleaded ge-
 yet that the commencement of all particular estates ought to be
 a pleading, because it is traversable; 1 *Infl.* 3 3. 6.; and that there-
 the plaintiff below claimed title under *Sanders*, he should have shewn
 nders's title commenced. 2dly, That the corn was not privileged
 idress at the time, because the sheriff had not only sold the corn but
 urred the writ, and that the law had had its effect.

his it was answered; 1st, that *Sanders's* title was immaterial; for
 he plaintiff below did not derive title under *Sanders*, but merely
 l that *Sanders* had such a possession in the premises both at the time
 eg the corn and at the time of his death as made the corn liable to the
 on; and that the plaintiff was a stranger to this estate, and therefore
 not set it out in pleading. *Tucker v. Hodges*, *Carth.* 2 9;—and 2dly,
 re corn was not distrainable, because when the continuance of an
 is uncertain and determined by the act of God the lessee or his repre-
 ves are entitled to the emblements, for which purpose the law gave
 ingress egress and regress; that the vendee of the lessee must have
 ne privilege; but that this privilege would be destroyed if as soon as the
 cut and before it is ready to be carried away it were liable to a dis-
 or rent due from a stranger; and that therefore the law gave the party
 onable time to take away the corn.

Chief Justice thought there was no foundation for the first objection:
 mbing on the second, a further argument was awarded.—*MS. Coll.*
 Chief Justice.

The plaintiff in error died before any judgment was given in *B. R.*;
 seems probable from a note in *Burnes* 206. that the plaintiff below had
 uits of the judgment given in his favor in *B. C.*

1738.9.

H. 12 G. 2. ROBERT MOONE on the Demise of JOSEPH FAGGE
 Monday, against CHRISTIANA HEASEMAN.
 Feb. 12th.

Devise of a farm called &c. to A. for life, remainder to her daughter B. the paying to each of her two sisters C. and D. 50 l. a-year; if either of them die the survivor to have the lease. **T**HE following opinion of the Court was delivered by *Willis* Lord Chief Justice. "Ejectment of lands in *Cowfold* and *Shermshurst* in *Suffex*; not guilty pleaded; and special verdict found, on which it now comes on.

It was found that the whole farm, of which the lessor the plaintiff only claims a moiety, is 110l. a-year; and that one *Susannah Morley* being seised of the whole in fee made her will 3d March 1673, and thereby devised the same in these words; "As for my lands in *Cowfold* called *Gratum* and *London* or by whatsoever name or names that farm called or known, I give to my sister Dame *Mary Fagge* during her natural life, and after her decease to her daughter *Susannah Fagge*, paying to each of her sisters *Elizabeth* and *Mary Fagge* 50l. a-piece of good and lawful money of *England*; and if either of them die, the survivor of them to have the legacy; and if the said *Susannah Fagge* die, will that the farm be divided between the survivors, and in case all three daughters die before their mother, I will descend to the right heirs of Dame *Mary Fagge* my fifth for ever."

That *Susannah Morley* died without issue 11th March 1673, and that Dame *Mary Fagge*, then wife of Sir *John Fagge* was her only sister and heir, who had three daughters, *Elizabeth*, *Mary*, and *Susannah*, and seven sons, *Robert*, *Timothy*, *James*, *George*, *Charles*, *Thomas*, and *Joseph*. That after the death of *Susannah Morley*, Sir *John Fagge* in the right of his wife entered and was seised in the right of his wife for and during her natural life. That *Susannah Fagge* died in the lifetime of her mother without issue, viz. on the 7th of August 1678. That *Mary* married one *John Spence* and had issue *John*, and died in the lifetime of her mother, viz. on the 8th of October 1683. That Dame *Mary Fagge* the mother died on the 22d of November 1687. That after the death *John Spence* son and heir of *Mary Spence* entered into a moiety of the premises; and *Elizabeth Fagge* entered upon the other moiety. And if the latter part of the devise "in case all three die before A. then to A. his heirs &c." had not been added.—A devise to A., he paying debts or a legacy, will carry the fee.

the other moiety, and was seised thereof, and being so seised afterwards married one *Philip Gell*, who afterwards entered and was seised thereof in the right of his wife *Elizabeth*; and being so seised he and his wife by indenture 1st September 1713 covenanted with *John Curson* and *William Fitzherbert* to levy a fine of their moiety the next *Michaelmas* term to the use of them and the survivor of them for their lives and the life of the survivor, and after their deceases to the use of *Charles Fagge*, the fifth son of Dame *Mary Fagge*, for his life; then to trustees to preserve contingent remainders; then to the use of *James Fagge* eldest son of the said *Charles* and the heirs male of his body, and for default of such issue to the use of the second son of the said *Charles* and the heirs male of his body, and for default of such issue to other uses mentioned in the said indenture. That a fine was levied accordingly in the *Michaelmas* term following.

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That after the levying of the said fine *Charles Fagge* had a second son born, by name *Joseph*. That *Charles Fagge* died 12th of *March* 1714. That *Elizabeth Gell* died without issue 11th of *June* 1716; and *Philip Gell* 17th of *June* 1719; after whose death *Robert Fagge*, eldest son of Dame *Mary*, entered into the premises in question and was seised; and being so seised 29th of *September* 1719 he made a lease to *Christiana Heafeman* for twenty-one (a) years, by virtue of which she entered and was possessed. That *James Fagge*, eldest son of *Charles*, afterwards viz. 15th of *October* 1730 died without issue; after whose death and before the time when &c *Joseph* his next brother entered upon the said *Christiana Heafeman* before her term was expired; and on the 2d of *October* 5 *Geo.* 2. demised to the plaintiff to hold for five years from the first of *October* before; by virtue of which demise he entered and was possessed until the defendant *Christiana* entered upon him and ejected him.

And the question (b) upon this special verdict depends wholly upon this, whether *Elizabeth Fagge* (afterwards *Gell*) took a fee-simple in a moiety by the devise of *Susannah Marley*, or only an estate for life?

(a) By consent the term was enlarged for five years by rule of court.

(b) This case was twice argued, by *Parker King's* Serjt. and *Draper* Serjt. for the plaintiff, and by *Belfeld* and *Wynne* Serjeants for the defendant.

1738,9. If she took a fee-simple, judgment ought to be for plaintiff;

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HEARSEMAN. If only an estate for life, for the defendant; for the on her death the estate descended to her eldest brother (under whom the defendant claims) as heir to *Mary Fagge*. And we are all of opinion that *Elizabeth* an estate in fee.

The first question that was made (and to be sure a very material one) was what estate *Susannah Fagge* took by the will made in her lifetime; because it would be hard to maintain that two sisters could have larger estates than she took.

It was agreed that many words would pass a fee-simple in a will which would not be so in deeds, if the intent of the testator plainly appears. But it was insisted that the words made use of here were not sufficient for that purpose: it was said that it is here found that Dame *Mary Fagge* was heir to the testator, and consequently her eldest son *John* under whom the defendant claims, was heir after the death of his mother; and the rule is, as it is expressly laid down in the case of *Gardner v. Sheldon*, *Vaugh.* 262, 3. that an estate shall never be disinherited except by express words or by necessary implication. But, if this rule were taken strictly, it would overturn a great many resolutions. I might mention a multitude of cases to this purpose: I choose rather to confine myself to those which are most parallel to the present. If a man devise an estate to another *paying his debts* or *paying a certain sum* in gross, the devise takes a fee-simple. It was indeed formerly a doubt whether or no he took a fee-simple unless the sum devised exceeded the annual value of the estate. But it has been long settled that such devise gives a man a fee-simple without regard to the quantum of the debts or of the sum devised to be paid and the value of the lands.

And so it is expressly held in *Co. Lit.* 9. b; 3 Co. 2. *Boraston's* case; 6 Co. 16. a; *Collier's* case; *Cro. Eliz.* S. C. *Bendlow* 37; *Cro. Eliz.* 205; *Wellock and Hasel* 1 *Roll. Abr.* 834. pl. 5; *Cro. Jac.* 527; the case of *Spicer*; *Cro. Jac.* 599; *Greeve v. Derwell*; 2 *Mod.*

Reed v. Hatton; and in many other cases (a). And the reason which is given for it in 6 Co. and in several other books is that every devise must be taken to be intended by the devisor to be for the benefit of the devisee; whereas if he (b) be obliged to pay the debts of the devisor or a certain sum in fees, if the devisee should happen to die before he can raise the money out of the profits of the estate, if he were only to take an estate for life he would be damaged and not benefited by this devise. But if *Vaughan's* rule were to hold, there would be an end of this way of reasoning, and all those rules must be overturned. For though this expression of paying the debts &c makes it highly probable (c) that it was the devisor's intention that the devisee should have an estate in fee, yet it is very far from being a necessary (d) implication. In many of the cases the money devised to be paid was near the value of an estate for life in the premises, and therefore it was possible that the testator might intend that he should only have an estate for life, because he might sell the estate immediately, and then he would be sure to be a loser by the bargain. But as this is a foreign and not a natural construction, it has been always rejected. However the cases shew that my Lord *Vaughan's* rule is not right.

But the rule is that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be

(a) See the cases collected in 8 Vin. Abr. 221. &c. "Devise" S. a.—See *Buddle v. Leppingwell*, 3 Burr. 1533; *Frogmorton v. Holyday*, 1 Bl. Rep. 10, and 3 Burr. 1618; *Goodright v. Allin*, 2 Bl. Rep. 1041; *Lovewell v. Love*, Corp. 302; *Doe d. Palmer v. Richards*, 3 Durnf. & E. 356; *Doe d. Taylor v. Woodhouse*, 4 D. & E. 89; *Goodright d. Baker v. Stocker*, 5 D. & E. 13; *Andrew v. Southouse*, ib. 292; *Doe d. Willy v. Holmes*, 8 D. & E. 1; and *Jenkins v. Jenkins*, Mich. 26 Geo. 2. C. B. post.—But this rule does not apply to the cases where an estate-tail is given to the devisee; *Doe d. Hansen v. Hansen*, Corp. 833, and *Denn d. Slator v. Slator*, 5 D. & E. 335.

(b) But the devisee does not take a fee where the charge is net on the estate in his hands; as where the devise was to A. "after payment of my debts and funeral expences." *Denn d. Moor v. Meller* 5 D. & E. 358; and 6 D. & E. 175.

(c) In *Reed v. Hatton*, 2 Mod. 26. the Court said "If there be a devise to me upon condition to pay a sum of money, if there be a possibility of a loss, though not very probable that the devisee may be damaged, it shall be construed a fee; and such construction hath been always allowed in wills."

(d) See also *Goodright v. Allin*, 2 Bl. Rep. 1041. where *De Grey* Chief Justice said the defendant must take a fee "by implication, not indeed a necessary implication, strictly and mathematically speaking, but so far necessary, as it clearly arises from the reasonable construction of the will."

disinherited

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1738,9. disinherited. Upon the strength of these cases it is plain
 { *Susannah*, if she had outlived her mother, would have
 a fee-simple by this devise; the money which she is due
 to pay being (as it is found by the special verdict) not
 times the annual value of the estate,

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As to the objection drawn from the subsequent
 “if *she die* the farm to go to her sisters,” we think it is
 weight; for these words must be intended to mean “if
 die before she has paid the legacies.” These words are
 made use of in this clause; and in the first part of it
 will not bear any other construction, where it is said “
ther of them die the survivor of them to have the lega-
 cy for it could never be intended that after the legacy paid
 ther of them should make use of the money until it
 seen which of them was entitled to it by survivorship.
 in this place it would be absurd to say that if she live
 pay her sisters their legacies and thereby became a purchaser
 of the estate, yet that she should have it only for life.
 think therefore that these words afford no reasonable ob-
 jection.

Taking it therefore for granted that *Susannah* took an
 estate in fee, the next question is what estate her sisters *E-*
beth and *Mary* took on her dying before the payment of
 legacies. And if the words of the will had gone no far-
 than that in that case the farm should be divided betw-
 them, yet we should have thought that they would
 taken a fee. For it is plain that the testatrix intended
 they should have the same interest in it as *Susannah*; as
 is given to them in lieu of their legacies which they
 have disposed of as they pleased; and therefore it is
 reasonable that they should have the same power over
 estate.

But if there were any doubt on these words, we think
 that the subsequent words “in case all three daughters
 before their mother that it shall descend to the heirs of
 mother” have put it beyond all dispute, and plainly shew
 intent of the testatrix. For if she intended that the daugh-
 ters should be only tenants for life, and consequently that
 should go to the heirs of the mother whether the daugh-
 ters died before their mother or not, it would have been
 absurd in her to say that it should go to the heirs of
 mother

whether in case the daughters die before her. Unless therefore 1738, 9.
 these words are rejected (which to be sure they cannot) they
 finally exclude any such construction that the testatrix in-
 tended them only an estate for life, even though they out-
 lived their mother.

And this is exactly agreeable to what is said by *Saunders*
 at the end of the case of *Purefoy v. Rogers*, 2 *Saund.* 388.
 It is not indeed the point as adjudged there: but *Saunders*
 was a very great man, and his reasoning in that case is I
 think unanswerable. The words there were, a man gives
 the inheritances of his lands to his wife for life and then to
 a person after his mother's life, and if he die before he comes
 to the age of twenty-one years, then he gave the inheri-
 tances of his lands after his wife's life to his own heirs for
 ever. The words are exactly parallel to the present; and
Saunders argued that by the words "if he die before twen-
 ty-one, then the estate should go to his own heirs," he must
 mean that "if he lived to be twenty-one, it should not go
 to his own heirs," but that the son should have an estate in
 fee. It was said indeed in the present case that the word
 "inheritance" was in that devise, which *vi termini* carries
 fee; but *Saunders* did not take notice of this; and it is
 plain no argument could be drawn from it, because the tes-
 tator used the very same word when he gave the estate to his
 wife only for her life.

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The strongest authority that was cited against this con-
 struction in the argument of the present case was the case of
Putnam v. Cooke, *Cro. Eliz.* 52 (a), where a man gave
 three messuages to his wife for life, and then the remainder
 of one of them to his son and his heirs, of another to her
 daughter and her heirs, and of the third to another daugh-
 ter and her heirs, and if any of them died without issue,
 then the survivors should enjoy totam illam partem equally
 to be divided between them; where it was held that these
 words gave only an estate for life to the survivors. If I
 had been to give my opinion on that case, I own, (as I am
 at present advised) I should have thought otherwise. But
 taking it to be law, there are no such words there as are in
 the present case "if all three die before such a time," that
 then

(a) 3 *Leon.* 180. by the name of *Putnam and Cooke's case*.

1738, 9. then it should descend to the right heirs of the devisor, which are the words on which we principally rely in the present case. There was an argument made use of on both sides from the penning of this clause in the will; on the one side it was said that when the testatrix intended to give only an estate for life she has given it by express words, for she devises the estate expressly to Dame *Mary Fagge* for her life and on the other side it was said that when she intended fee simple she has done it by proper words; for she has given it expressly to the right heirs of Dame *Mary Fagge*. As this argument is equally strong both ways, it proves nothing at all.

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MAN.

But for the other reasons which I have already given we are all of opinion that *Elizabeth* and *Mary* took estates in fee upon the contingencies of their surviving their mother and of their sister's dying before she paid their legacies both which contingencies happened; and therefore we are all of opinion that judgment must be given for the plaintiff (s).

(d) The following private note was added in Lord Chief Justice *Willers* book:

"It is said in *Gro. Car.* 369. and agreed by the whole Court in the case of *Spirit v. Bance* that the words in a will which disinherit an heir ought to have an apparent intent and not to be ambiguous and doubtful, and that the intent ought to be collected out of the words of the will, and not from any foreign intendment or averment. And there is the same declared by the Court in the case of *Wilkinson v. Merryland*, *Gro. Car.* 450; which is exactly agreeable to the rule which I have laid down in this case, and shews that the rule laid down by *Puryear* in the case of *Gardner v. Shute* is a new notion of his, and not the right rule."

—The judgment (above given) was affirmed in error, *M. & G. 2. B. R.* after three arguments at the bar.—In addition to the points discussed in the Common Pleas, another objection was taken in *B. R.* by the plaintiff in error, that the judgment was erroneous because it was judgment for a divided moiety, whereas the two sisters *Elizabeth* and *Mary* were tenants in common, and therefore the judgment ought to have been for an undivided moiety.

But the Court answered this by saying that it did not appear that they were tenants in common at the time of bringing the ejectment, but that on the contrary it appeared that the heir of *Mary* entered into one moiety and the lessor of the plaintiff into the other for which the ejectment was brought. But even admitting that the lessor of the plaintiff was a tenant in common, they said there was no weight in the objection, for that a tenant in common could not create a severance by action and that a judgment to hold in severalty would make no division.—*MS. Coll. Willers Ch. Justice.*—And vid. 7 *Mod.* 433. oct. ed.

1739.

JAS CORNISH *against* WALTER BOLITHO.E. 12 G. 2.
Tuesday,
May 22d.

SE. The first count is on a promissory note for The plain-
tiff declared
on a promi-
sory note
t. 10s. dated the 12th of July 1736, signed by the
t, payable to the plaintiff or order on demand, for
eived. The second count is the same; but it goes
ys that before the signing of the note last-mentioned
hen and there agreed by and between the plaintiff and alleged
defendant that in case the said *Walter* (the defendant) that before
y the malt expended in his dwelling-house for the was given
rs next ensuing of the plaintiff, then the note last-it was
d was to be void; and the said plaintiff was to agreed be-
tween them
defendant in the same manner as the rest of the that if the
of the plaintiff; and the plaintiff avers that since defendant
ig of the said note the defendant hath expended should buy
ntities to wit 100 quarters of malt in his dwelling- of the plain-
d that the said defendant did not buy the said malt tiff all the
led or any part thereof of the said plaintiff, but malt ex-
so to do. pended in
his dwell-
ing-house
for three
years the
note should
be void;
averring
that the de-
fendant had
expended a
certain
quantity of
malt &c but
had not
bought it
of he plain-
tiff:

were likewise two other counts, which were not
o the point in question.

defendant to the first third and fourth counts pleaded
al issue that he made no such promise, and issue
thereupon; and demurs to the second, and assigns
of demurrer that the plaintiff hath not shewn in
ation that he from the time of making the said
did use and exercise the trade and business of a
and was ready and willing to sell and deliver to
Walter such malt as he the said *Walter* expended in
ng-house from the time of making the said agree-
the day of obtaining the original writ.

intiff joins in demurrer.

erjt. for the defendant agreed that in the case of
mises there is no occasion for an averment of mu
nances, as is held in 1 *Saund.* 320; 1 *Lev.* 274;
zance, and then if the defendant would take advantage of it he should
ormance on his part.

L

and

1739. and the case of *Blackwell v. Nash* (a) *M. 9 Geo. 1.*
 but he insisted that this was part of the agreement as
 only consideration that appeared for the note; and that
 fore the plaintiff ought to have averred that he was read
 willing to have performed so much of the agreement :
 necessary to be done on his part, and that the defenda
 fufed to perform his part of the agreement; and fo
 purpose he cited *Lamb's* case, 5 *Co. 23. b.*; 3 *Lev.*
Keech v. Knight; and 1 *Lutw.* 490. He likewise i
 that the plaintiff ought to have averred that it was the
 dwelling-house that the defendant lived in at the time
 agreement; and for this he cited *Cro. Jac.* 235.

CORNISH
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Draper Serjt. contrà admitted all the cases, but said
 they were all distinguishable from this; for that the
 agreement is no part of the note, and the action is fo
 merely on the note; the rest therefore ought to be re
 as surplufage, or at most the agreement can be conf
 only as a defeazance, and therefore if the defendant wi
 any advantage of it he must shew the performance o
 part; and

Of this opinion were *The whole Court*; and to the
 objection, to which no answer was given by *Draper*,
 fwered that the averment is as certain as the agreemen
 it does not mention any particular dwelling-house.

So judgment was given for the plai

(a) Vid. 8 *Mod.* 106; and 1 *Str.* 535.

Friday, HUGH MUCKLESTONE against CATHERINE TH
 May 25th. Executrix of JOHN THOMAS.

The lessee " COVENANT. The plaintiff sets forth an inde
 covenanted dated 1st of February 1720 between the plaintiff
 to put a John Thomas, whereby the plaintiff let unto John Thom
 house in re- John Thomas, whereby the plaintiff let unto John Thom
 pair before executors administrators and assign sa messuage or dwe
 the 1st of June, 1720
 " 5000 slates being found allowed and delivered by the lessor towards the repair
 afterwards to keep it in repair during the term.
 The lessor assigned a breach for not keeping in repair after the 1st of June: 1
 plea to say that the lessor had not after making the lease found allowed and deliver
 slates &c.

estate lying and being in *Wesstry*, together with all 1739.
 buildings &c thereto belonging from the first of
 next for twenty-one years under the yearly rent of
 half-yearly, the first payment to begin at *Mich-*
ben next. And the said *John Thomas* covenanted for
 his heirs executors and administrators with the plain-
 heirs executors administrators and assigns that he the
Thomas his executors and administrators and every
 should on or before the first day of *June* next en-
 date of the said indenture, or sooner if possible,
 and their own proper costs and charges repair amend
 the said messuage or dwelling-house and all other the
 thereby granted in sufficient tenantable repair,
lates being found allowed and delivered on the said pre-
the said Hugh Mucklestone his heirs and assigns for
wards the repairing thereof; and all and singular the
 emises being so well and sufficiently repaired and
 should and would from time to time and at all times
 the continuance of the said indenture of demise main-
 tain and keep at his and their like costs and charges,
 the end of the said term or sooner expiration thereof
 so leave and yield up the same to the said *Hugh Muc-*
 his heirs and assigns (fire excepted). That the said
Thomas on the said first of *May* entered by virtue of
 demise and was possessed until his death; and on the
April 1734 made his will in writing and appointed
 sole executrix; and afterwards to wit on the
April 1734 died possessed of the said messuage &c;
 defendant as executrix to him entered into the said
 &c and was and still is possessed thereof, the plain-
 ing seised of the reversion. And he the plaintiff avers
 part of the premises was or is consumed or impair-
 ire; and though the plaintiff hath well and sufficiently
 ned &c all the covenants and agreements in the said
 are, the plaintiff in fact says that the defendant being
 d of the premises as aforesaid after the death of *John*
 s, to wit, on the first of *May* 1737 and from thence
 he suing out of the original writ suffered the said
 ge &c to be very ruinous and not in sufficient tenant-
 pair for want of necessary amendments and repairs;
 the form of the indenture &c; and that therefore
 defendant hath not performed the covenant &c. but hath
 the same. Damage 100/.

1739. *The defendant pleads that the plaintiff hath not at
time since the making of the said indenture hitherto found*
MUCKLE- lowed and delivered on the said demised premises or any
STONE. thereof 5000 slates for and towards the repairing thereof
against and this he is ready to verify &c.
THOMAS.

The plaintiff demurs generally; and the defendant joins in demurrer.

Draper Serjt. for the plaintiff. *Boote* Serjt. for the defendant.

It was said for the plaintiff that the word "being" implied that the plaintiff had provided at the time of the indenture 5000 slates, otherwise the expression would have been "being to be found". That if the words would admit of this construction, yet that finding the slates could not be considered as a condition precedent, but as a mere covenant; and if so, the nonperformance of that would not excuse a nonperformance on the part of the defendant. That there is no difference between saying "the land finding" and "being found by the landlord"; and the former will certainly amount to a covenant in the same manner as "yielding and paying". That besides the action is brought against the person himself for nonperformance of that part of the covenant, but against the assignee not for breach by her testator but upon a breach by herself of another part of the covenant, to which this has no relation; the defendant has only pleaded that he (the plaintiff) did not deliver any slates after the making of the indenture.

It was said for the defendant that this must be considered as a condition precedent, or at least as a restriction or qualification of the covenant on the part of *John Thomas*; and it was the same as if he had said "provided"; and that the plaintiff ought to have averred that he had provided and delivered these 5000 slates, otherwise he could not maintain this action.

For the plaintiff were cited 1 *Lev.* 155; *Clapham v. May*; 1 *Rol. Abr.* 416. pl. 15. *Goldbolt* 70; *Barker v. Fleetwell*.
For the defendant 1 *Rol. Abr.* 518, C. pl. 2 & 3; 1 *Lutw.* 39.

Brown

and *Walker*, *Hob.* 42; and *Cro. Jac.* 645, *Slator v.* 1739.

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We are all of opinion that the word "being" did not necessarily imply that the plaintiff had provided the slates: if he, the words "having been" would have been more proper.

But "being" is a middle word, which might admit of significations.

We were of opinion that this ought rather to be considered a covenant than a condition precedent (a). But that ever in this case the plea of the defendant was not good for several reasons;

1. Because it only said that the plaintiff had not found and recovered any slates after the making of the indenture, whereas he might have found and delivered them before.

2. Because this is an action against the defendant as to the first part of the covenant for not keeping the premises in repair, and not on a breach by the testator in his lifetime, (who, as appears by the pleadings lived until long after the 1st of June 1721, for not putting the premises in repair before that time, to which only this finding of slates relates. For supposing the testator put the premises in repair before the first of June without requiring the slates, (and we are rather to presume that he did at this distance of time,) the executrix was certainly obliged to keep them in repair; if that were not the case, the defendant ought to have pleaded specially that her testator did not put them in repair, and that the plaintiff did not find the slates, and that therefore she was not obliged to keep them in repair. As the objection to the declaration, we were of opinion that an averment were necessary, which we doubted, yet that being an affirmative covenant on the part of the plaintiff, a general averment of the performance of all covenants is sufficient.

So, per Curiam, Judgment for the plaintiff (b)."

(a) Vid. *Acherly v. Vernon*, *post*. and the cases there referred to in the text.

(b) *Thomas v. Cadwallader*, *post*, *Mich.* 18 Geo. 2.

1739.

E. 11 G.
Sund. day,
May 26th.

A. DANBY Assignee of MARY DAWSON, De-
of MATTHEW DAWSON, against CHRISTOPHER
GREGG (a).

[Hil. 12 Geo. 2. Rol. 244, 5.]

Covenant to levy a fine of certain lands in the township of A. in the parish of B. on the request and at the costs of the grantee; breach assigned that the grantor refused to acknowledge a fine (tendered to him) of lands in the parish of B.—
Plea that the note of the fine tendered comprised other lands in B. than those contained in the covenant, of which the grantor was seized; and held a good plea. 7 Mod. 292. S. C.

“COVENANT. The plaintiff sets forth an indenture dated 9th of *March* 1705 between the defendant *Margaret* his wife and *Matthew Dawson*; whereby the defendant in consideration of 155*l.* in hand paid unto *Matthew* of the tenements by the name of several (describing them,) all which said closes lands grounds premises were situate lying and being within the town fields and territories of *Ilton* in the county of *York*, to the same to *Matthew Dawson* his heirs and assigns for ever. And *Christopher Gregg* covenants for himself his heirs executors and administrators with *Matthew Dawson* his heirs and assigns he the said *Christopher Gregg* and *Margaret* his wife, heirs and assigns, and every other person &c, should at any time after that time upon reasonable request and at the charge in the law of the said *Matthew Dawson* his heirs or assigns make suffer and execute or cause to be made suffered and executed all and every such further and lawful act and assurance in the law for the further assuring of the premises every part thereof, be it by matter of fact or record or otherwise, as by the said *Matthew Dawson* his heirs or assigns their counsel learned in the law shall be required, so as persons to make such further assurance shall not be obliged to travel farther than the castle of *York* for the doing thereof, which fine or fines &c should be and enure to the uses of

(a) This case is reported in 5 *Vin. Abr.* 140. pl. 55. but there are mistakes in the facts in that report; 1st. That the question arose on a point of the wife before marriage; and 2dly, That the defendant was seized of other lands in *Ilton* in right of his wife: according to the Paper it appears that the case arose on the covenant made by the husband that husband and wife would make any further assurance &c. and that the husband was seized of the lands comprised in the covenant as well as those mentioned in the plea in his demesne as of fee, not in right of his wife.

the plaintiff and his heirs, by virtue whereof he was
seised in fee; and afterwards after the making of the
cures of lease and release and before the suing out
final writ, viz. on the 26th of *April* 1738, for the
returning of the premises to the plaintiff and his heirs
to the said covenant he at his own charges did
write and engrossed a note of a certain fine to
be acknowledged by the said defendant and his wife of the
which note is set forth in the declaration and is of
cells of land in the parish of *Masbam* in the county
and that he did then and there cause the same to be
tendered to the said defendant and his wife be-
commissioners (naming them) duly and lawfully
to take such acknowledgments &c then and there
ready to take the same, and in their presence
the defendant and his wife to acknowledge the
acknowledgment being a reasonable act for as-
. And the plaintiff assigns as a breach that the
and his wife did not acknowledge the same, but
to do. Damage 400/.

defendant saith that he was always ready and willing
any further and lawful assurance according to his
but pleads that at the time of tendering the said
fine he was and is seised in fee of divers other lands
in the said parish of *Masbam*, viz. of twenty-five acres
of meadow and twenty acres of pasture.

1739. The plaintiff demurs generally, and the defendant joins in demurrer.

DANBY
against
GREGG.

Serjt. *Booth* for the plaintiff cited *Moor* 810; 1 *Bulstr.* 9 *Cro. Jac.* 251; *Boulney v. Curteys*; 7 *J.* 1., where the fine of the fine tendered was of three messuages, and the defendant pleaded that two more messuages were comprised in the covenant to be assured, and the plea was overruled by the whole Court.

Serjt. *Draper* for the defendant cited the case of *Wilford v. Walsh*, 2 *Bulstr.* 317, and 1 *Roll. Rep.* 103, 117; 12 *J.* 1. in which he said the contrary was determined, and the case in *Cro. Jac.* 251, held not to be law. He also cited *Trinity* case, *Latch* 186, to shew that the defendant was not obliged to acknowledge a fine before commissioners.

We were all of opinion that the plea was good; for though there are generally more acres of land put in a fine than is intended to pass, that the fine may be sure to comprehend enough, and therefore this alone would not be a sufficient objection, yet the plaintiff ought not to have added a new place, since there could be no necessity for that. For the covenant only extends to lands in the township of *Ilton*, and the fine is of lands in the parish of *Masbarn*, in which the defendant expressly avers that he has other lands. As in the case in *Cro. Jac.* 251, the defendant did not aver that he was seised of any other messuages. Besides this is stronger, being in the case of a wife, who may be barred of her dower by this means.

As to the objection that they were not obliged to go before commissioners to acknowledge the fine, we did not rely on that. But my Brothers *Denton* and *Fortescue A.* seemed to be of that opinion: But I and my brother *Wm. Fortescue* thought otherwise.

Judgment for the defendant nisi; the last day of the term adjourned until the first day of *Trinity* term at the desire of Serjt. *Wright*, who admitting then that he had no cause to shew judgment, was made absolute."

1739.

ACHERLEY *against* BOWATER VERNON. (a). E. 12 Geo. 2

Monday

June 4th.

A. by will
gave a rent-
charge to
his sister,

opinion of the Court was thus delivered by

Lord Chief Justice. "Debt. The cause was tri- payable
Lord Chief Justice Eyre in London 24th February, half-yearly,
and said he
verdict for the plaintiff for 1900*l* subject to the give it to
the Court of B. C. on the point of law arising her in lieu
and codicil of *Thomas Vernon Esq.*; and therefore and satisfac-
tion of all
the will and codicil as related to the point in ques- claim she
tioned to be inserted in the case. might have
on his real
or personal

on was brought by the plaintiff as administrator of estate and
Elizabeth Acherley deceased, and was founded upon

32 Hen. 8. c. 37. entitled an act for recovery of upon condition
that she release
of rent by the grantees of tenants in fee-simple, all right and
rights to the administrators of tenants for life of claim there-
to to his exe-
cutors and
trustees;
the sister
lived several
years, with-
out execut-
ing any re-
lease; held
that the
husband of
the sister
was not en-
titled to the
arrears of
the annuity

was brought by the plaintiff for the arrears of an
200*l*. due to his said wife, which was devised
e will and codicil of *Thomas Vernon*.
sets forth that the said *Thomas Vernon* by his
ing date the 17th of June 1711, gave unto his sis-
ter *Acherley*, then the wife of *Roger Acherley*, one an-
nuity charge of 200*l*. a-year to be paid to her half-
of the rents and profits of his real estate to her
for her separate use, exclusive of her present or
taken husband, and in case she shall happen to sur-
vive, my will is that the 200*l*. per annum be from
of my wife's decease made up the sum of 400*l*. — The re-
lease was a

during the life of my said sister for her sole and
use. And he by his will gave to his niece *Letitia*
the sum of 1000*l*. at her age of 18 or marriage
should first happen, provided she married with the
her father and mother and his widow or of such
should be then living: but if she married without
it, he gave her but 100*l*. and the 900*l*. was to
all into his personal estate &c. And after several
performed
in a reason-
able time;

within six months, or at all events during her life.

pp. 513; and Fort. 188, S. C.—See also Com. Rep. 381; 1 P.
Mod. 68; 1 Mod. 518; 2 Equ. Caf. Abr. 209 pl. 2; 2 Bar-
; and 3 Bro. Parl. Caf. 107. for other points in different cases
same particu.

1739. other devises and legacies, which are immaterial to the point in question, he gave and bequeathed all the rest and residue of his real and personal estate, all his debts legacies and general expences being first paid and satisfied, unto his brother *Roger Acherley* and four other trustees their heirs executors and administrators upon special trust and confidence in the reposed that (the annuity and annual rents before devised to his wife and sister and other persons therein for that purpose before named being first duly paid out of the rents issues profits of his real estate whereof he should die possessed whether freehold or leasehold, and after payment of all his debts and legacies that he had or should by his said will or by his codicil or codicils give or devise, his funeral charges and charges of the probate of his said will and administration being paid and satisfied,) the said trustees and the survivors and all survivors of them and the heirs and assigns of such survivor should lay out the rest and residue of his personal estate in lands in such manner as therein directed, and that the same when purchased should be settled to such uses as therein also directed, *but should be subject to such of the annuities given by the said will as should not be then determined.*

And the said *Thomas Vernon* by his codicil, dated the 12th of February 1720, ratified and confirmed his said will (and in the alterations therein mentioned), and in the first part directed that the proportion or legacy thereby given to his niece *Isletitia Acherley* be made up in the whole 6000*l.* payable to her at her age of 21 or marriage, which first happen; and he recommended it to her to take her mother's and his wife's consent to the marriage, if either should be then living. Then follow these words which the question depends; "But my mind and will is that what I have so given to my sister and niece be by them accepted and taken in lieu and satisfaction of all they either of them might claim out of my real or personal estate, and upon condition that they release all right and title thereunto unto the executors and trustees in my will named." And having thus provided for my sister and niece, I devised all the lands by me purchased since the publishing of my will (and he had in fact purchased several estates afterwards) to the same uses as I have given my manor of *Hanbury* and the bulk of my estate by my will."

Ermon died 5th of *February* 1720; after whose
 said *Roger Acherley* and *Elizabeth* his wife in right
 id *Elizabeth* were seized of the said yearly rent de- 1739.
 ie said *Elizabeth* as aforesaid in their demesne as of
 y virtue of the said gift and devise, and the defend-
 ed on the manor and other the lands chargeable,
 and ever since has been tenant of the demesne
 The action is brought for 1900*l.* for nine years and
 arrears of the said annuity of 200*l.* due on the
bruary 1731 in the lifetime of the said *Elizabeth*
 not also in the lifetime of the said *Mary* the wife of
Ermon. *Elizabeth* died 3d of *May* 1732, and she
 le any release unto the trustees or executors in the
 will named.

ACHERLEY
 vs
 VERNON.

question which arises upon this case (a), and which
 red for the opinion of the Court, is whether the
 is administrator of his wife *Elizabeth*, is entitled
 to the arrears of this annuity or any part thereof,
Elizabeth never having executed any release either
 or personal estate of the testator to the executors
 as according to the condition in the codicil. And
 depend upon these two questions ;

whether it be a condition precedent or subsequent ;
 condition precedent, the plaintiff is certainly en-
 titled, because nothing ever vested in *Elizabeth*,
 having performed the condition.

But supposing it to be a condition subsequent, the
 question will be whether it ought not to have been per-
 formed a reasonable time, or at least some time in the life
 of *Elizabeth*.

As to both these questions, I shall in the first place
 state what was the intent of the testator, and in the next
 what construction may be put on the words of the
 will according to the rules of law and grammar.

We are of opinion that the intent of the testator is
 clear ; that his sister and her daughter should have
 of his real or personal estate but what he has given

This case was argued four several times; twice in the time of Lord
Roxe, and twice after Lord Chief Justice *Willis* presided in

them

1739. them by his will and codicil; that they should accept of it as a full provision for them and in full lieu and satisfaction of all their claims and demands whatsoever either out of real or personal estate, and that the person to whom he had given his estate with an intent to preserve his name and family should enjoy it in peace and quietness, without any disturbance from his female heirs. Having thus (says he) provided for my sister and niece, I devise all my estate &c. And this being his plain intent, he could never intend that his heirs, for whom he had so provided, should be at liberty to dispute the devisee's right for several years together, yet all the while to insist on the payment of their annuity. He therefore certainly intended an immediate release, or at least that his sister should receive no part of the annuity until she had executed a release.

ACHERLEY
against
VERNON.

This being his plain intent, I will in the next place consider whether or not such a construction can be put upon the words of the codicil according to the rules of law and grammar as is agreeable to the intent of the deviser. I must observe that whenever I am fully satisfied of the meaning and intention of the testator, I shall always endeavour, if possible, to put such a construction upon the words of a will that his intent may not be frustrated. And with that inclination I consider the words of this codicil, which plainly create a condition; "But my mind and will is that what I have given to my sister and niece be by them accepted and taken in lieu and satisfaction of all they or either of them may claim out of my real or personal estate, and upon condition that they release all right and title thereunto unto the executor and trustees in my will named &c." My Brothers are of opinion that the words of this codicil are sufficient to create a condition precedent. And though I doubted of this at first, I am inclined to be of the same opinion, though I am not so clear as to this point as I am in respect to the second, and if I agree with them in either point, the consequence is that the plaintiff cannot recover.

I know of no words that either in a will or deed necessarily make a condition precedent, but the same words will either make a condition precedent or subsequent according to the nature of the case.

clause is placed prior or posterior in the deed, so that it operates as a condition or a covenant. For the same words have been construed to operate the one or the other according to the nature of the transaction." It has more frequently arisen on the construction of contracts. And all the determinations are founded on the same ground, and of the parties as it is to be collected from the whole instrument without considering the order in which the respective covenants; or, as more accurately expressed by Lord Mansfield in *Presn. Dougl.* 610, "The dependence or independence is to be collected from the evident sense and meaning of; and however transposed they may be in the deed, their must depend on the order of time in which the intent of the requires their performance."

on this subject may be arranged in three classes;

1. *Independent covenants*, where one party may maintain an action for the covenant to be performed by the other, without averring performance of the covenants on his own part, and to which action the defendant pleads nonperformance of the plaintiff's covenants in bar.

2. *Dependent and concurrent covenants*, where the act of each is to be done at the same time.

3. *Dependent covenants or conditions precedent*, where the performance of one act depends on the prior performance of another by the other party, and where until the prior act is done no right is vested in the plaintiff to perform it, nor is the other party liable to an action for nonperformance. And in both the last cases the party suing must aver that he performed, or was ready to perform, or was prevented by the other party from performing, the covenants on his part, and the defendant may plead nonperformance by the plaintiff in bar of the action.

The first kind are the following modern cases; *Blackwell v. Nafé*, 1 Str. 411; *Stapleton*, ib. 615; *Merritt v. Rane*, ib. 450; *Dawson v. Myer*, 10 Mod. 121; *Martin's v. Fisher*, 1 Wils. 88; *Boone v. Eyre*, 2 Bl. Rep. 1312; *Wren*, 5 Durnf. & East 409; *Campbell v. Jones*, 6 D. & E. 570; *Eyre*, 2 H. Bl. Rep. C. B. 273. n. a. and *Terry v. Duntze* Bart. 2 H. Bl. 19.

The second fall within the second class; *Lock v. Wright*, 1 Str. 569; *Bartley*, Dougl. 684; *Kingston v. Preston*, cited in Dougl. 688; *Nunn & Durnf. & East* 761; *Lord Aldborough v. Lord Newhaven*

1739. another, or agree to do any thing or pay a sum of money in consideration of a thing to be done, in these cases which is the consideration is looked upon as a condition precedent. So is the case of *Peters v. Opie*, 1 Vent. 177. 1 Saund. 350. If a man agree to pay a sum of money to another pro labore suo in pulling down a house, the pulling down of the house is a condition precedent. So is the case of *Thorpe and Thorpe*, 1 Salk. 171, where a man agreed to pay a sum of money to another *be releasing the equity of redemption* in certain lands. And so is the case of *Turner Goodwin*, adjudged by Lord *Macclesfield* and the rest of the Judges of B. R. upon great consideration, P. 13 Ann., which case *Goodwin (a)* was to pay *Turner* 1500*l.* *be giving a judgment*. In all which cases it was holden that the party who was to receive the money was not entitled to demand it until he had performed that which was the consideration of the payment, and which was considered in these cases to be in the nature of a condition precedent. It was said indeed in the case of *Thorpe and Thorpe* that on a particular day be appointed for payment and the day happen before the thing can be performed, an action may be brought for the money before the thing is done, and in this case it must not be considered as a condition precedent: if the thing can be done before, it must. It is likewise held in *Hob. 41.* and several other books that if a man has no other remedy for the thing which is to be done in consideration of the payment but the stoppage of the money, that case he is not obliged to pay it until the thing is done. And for this reason it has been always holden that if an annuity be granted pro consilio impendendo, if the grantee refuse counsel the annuity ceases. So likewise if it plainly appear to be the intent of the testator that the devisee shall have the benefit of the devise unless he perform a certain thing enjoined him by the deviser, this is a condition precedent and the devisee shall have no benefit of the devise until he perform it, even though the condition be never so unreasonable if it be not illegal or impossible; for *cujus est dare est disponere*. A man may dispose of his estate at his own will and pleasure and upon what terms he thinks fit; and men's wills (as Lord *Hale* says) are the laws that prevail.

(a) Vid. *Fert.* 145. 10 *Mod.* 154; 190; and 222. *Gill. Caf. in Law* & *Eq.* 40.

are allowed to make concerning their estates, and courts
 are bound to carry them into execution. It is upon
 foundation that the great case of *Bertie v. Falkland* 1739.
 is adjudged, which was so well considered and so so- ACHERLEY
 determined, where a devise to an infant of but ten against
 years of age in case the married Lord Guildford within three VERNON.
 years became void on nonperformance of the condition,
 as she was an infant, and though the performance of it
 was in her power; and the reason given for it was be-
 cause it was a condition precedent. And it was said in that
 case that even a court of equity can give no relief in case of
 condition precedent, though it becomes impossible by the
 act of God. The case of *Fry and Porter (b)* is founded on
 the same reason.

Now I will try the present case by the reasons of these
 cases. And, first, this annuity is plainly granted in
 consideration of the release; so are the express words of the
 will. Nor has the devisee of Mr. Vernon any remedy to
 obtain such release but by stopping the payment of the an-

And it is as plain, I think, or rather plainer than in
 the case of *Bertie and Falkland*, that Mrs. Acherley should
 receive the annuity unless she perform the condition. The
 words in the one are "in case she marries"; in this "upon
 condition that she release"; which is certainly at least as
 strong if not a stronger expression than the other. And there
 is no pretence to say in this case that she could not perform
 the condition before the time of the payment of the annuity,
 as the first payment was not to be until six months after the
 testator's death, and she might as well release her right in
 six months as at any future time. Besides the particular
 manner of penning this clause affords another very strong ar-
 gument that this was intended to be a condition precedent;
 the words are in the present tense. He wills that the
 annuity *be* accepted in lieu and satisfaction and upon condi-
 tion *that she release*; which is just the same as if he had said
 "I will give her the annuity *she releasing*," which expression has
 been holden to make a condition precedent, as ap-
 pears from the cases which I have already mentioned, and
 the case of *Large and Cheshire*. 1 Vent. 147, which is

id. 2 Vern. 333; Salk. 231; 12 Mod. 182; and 2 Freem. 220.
 Mod. 300.

1739. a case in point to this purpose. A man agreed to make a will to J. S. he making him a good estate in certain lands; and it was holden to be a condition precedent, and that ^{against} ~~ACHERLEY~~ not demand the money until he had made him a good estate in these lands.

I will in the next place consider the objections that been made against this construction.

1st, It was said that the devise of the annuity is in the will, and the condition is only in the codicil which made nine years afterwards, and therefore it must be a condition subsequent. But there is no weight in this objection for the will and codicil which confirms the will are declared to be part of it must be considered as one and the same instrument; and there is no priority or posteriority in a will as there is in a deed, but every part of a will must be considered together.

2dly, It was said that if this be said to be a condition precedent, it was an impossible condition and therefore void because the wife could not make an effectual release of her husband joined with her in a fine, and he might not do so. But the foundation of this argument is false, admitting that she could not make an effectual release of her husband joined with her, it is not therefore an impossible condition but only a condition which it was not within her power to perform. And there are a multitude of conditions in the books which are held to be good, though it is not in the power of the party to perform them without consent or assistance of another. If this were an objection what would become of all the conditions to marry? It is in no one's power to marry whom he pleases. Besides, it is not very clear that it was out of Mrs. Acherley's power to release her coverture to perform this condition. For a covert may levy a fine without her husband, and it will bind her and her heirs if the husband do not enter and avoid as is expressly held in 7 Hen. 4. 23; 11 Hen. 4. 25. *Mary Partington's case* 10 Co. 43. a., and several others (a). And if in the present case Mrs. Acherley had levied a fine and her husband had endeavoured to avoid it by

(a) *Enc. Abr.* "Finer," p. 33; *Hob.* 225; the *Earl of Bedford's case* 7 Co. 8;—See *Morau's case*, 2 Bl. Rep. 1205.

1739. and is undoubted law (a). Now if *Letitia* had the money at her day of marriage before twenty-one, she would have received a fine and had afterwards endeavoured to avoid her nonage, the Court of Chancery would certainly have hindered her by injunction, which Mr. *Vernon* well knew therefore might very well intend this to be a condition precedent. And I am the more inclined to think that by the alteration that he made in his codicil; for he left her the 1000*l.* by his will, to which he did not annex a condition payable at the age of eighteen; but when he made it payable at twenty-one. Though she doubted at first, upon consideration I am inclined to the same opinion with my Brothers that the condition annexed to Mrs. *Acherley's* annuity was a condition precedent.

ACHERLEY
against
VERNON.

Secondly.—But supposing it to be a condition subsequent, I am still of opinion that the plaintiff cannot recover that it ought to be performed in a reasonable time. I am rather inclined to think that it ought to have been performed at the end of six months when the first payment of the annuity became due. But I am clearly of opinion it ought to have been performed before it became payable; for to say that it is now become impossible by the death of God, and that it is therefore void if a condition subsequent, is a mere fallacy. If indeed it had been to be done on a particular day, and she had died before that day, the argument would have had great weight. But she might and ought to have performed it immediately after she insisted upon having her annuity; and therefore it is not in her own laches that it was not done before, of which she cannot take advantage. To say that she had her whole life to perform it in is, I think, most absurd; for it is almost contrary to the express directions of the testator to put the devisee's right to the estate for many years all along enjoy the benefit of her annuity. If I were to be very busy to take notice of any thing that is not in the

(a) *Parker v. Primat*, 3 *Keble*, 48*C.* *Herbert Perrot's case*, 2 *Moore* 22; *Sir W. Jones*, 390; *Winch* 103*A*; 12 *Co.*, 122; 124. *S. P.* 2 vol. *Parl. Roll*, 50 *Edw.* 3. p. 342.

husband did in fact controvert the devisee's right to the estate for many years together. 1739.

ACHERLEY
against
VERNON,

said that there ought to have been a request on the part of Mrs. Acherley was obliged to execute a release. I think not; for until she demanded the annuity I do not think it worth their while to demand a release, it was her business to do the first act in order to get herself to the annuity.

An argument was made use of a little inconsistent; for it was said that as Mr. Vernon had given away part of his real and personal estate, and had undoubtedly intended to do so, Mrs. Acherley had no right to release, and a release would have signified nothing the condition was entirely immaterial. But it is plain that she thought it material, and it is as plain from what has been said that she judged right. However if she had had notice of right, as the testator gave her her annuity on these terms, she was equally obliged to perform the same, as was expressly holden in the case of *Doughty v. Sand.* 215, where the party who was directed to do so had no pretence of right.

On the whole we are all of opinion that the condition of this annuity not having been performed by Mrs. Acherley, and it being now become impossible that it should, the consequence is that the plaintiff as representative of Mrs. Acherley cannot recover any part of the value of this annuity.

Accordingly therefore to the rule entered into at the trial the verdict given for the plaintiff must be set aside, and the plaintiff must pay the costs of a nonsuit: but I hope as the matter is between near relations the defendant will not insist on costs."

1739.

T. 12 & 13 G. 2. JOSEPH PRESTON on the Demise of PETER E.
 Tuesday, July 10th. *against* MARY FUNNELL.

THE following opinion of the Court was delivered
Willes, Lord Chief Justice. "Ejectment. This
 before the Court on a case which was made by my Br
Denton in a cause tried before him at *Norwich* assizes, &
 case is as follows.
Francis Eagle, being seised in fee of the estate in q
 on, being a copyhold estate held of the manor of *Mulh*
 in *Norfolk*, surrendered the same on the 18th of *Jun*
 1689 to the use of his will, and then devised it in
 words; "I give unto my brother *Thomas Eagle* all
 goods chattels household stuff money plate rings &
 houses lands and tenements, and all that I have in the
 whatsoever both within doors and without, for and d
 his life, my debts funeral charges and legacies being
 satisfied and discharged, and then the houses and lan
 the nearest of my relations (that is to say) to *Thomas*
 to be my brother's son to *him* and *his heirs for ever*, and after
 deceases to the nearest of kindred to me, first male and
 female, which said lands and houses are never to be
 neither freehold or copyhold, and to be kept up in goo
 pair; and this house wherein I now dwell is to del
 to the name of the *Eagles* and to be kept up as long a
 world shall endure and never to be sold." After the dea
 the testator *Thomas* his brother entered, and was adm
 pursuant to the will, and died. After his death at a C
 held on the 24th of *October* 1709 *Thomas* the devisor's brot
 son was admitted in fee to him and his heirs by virtue of
 said will, and afterwards at a Court held on the 28th of *M*
 1715 for a valuable consideration he surrendered and
 the premises to *James Charles* and his heirs, who was
 mitted at a court held on the 14th of *May* 1716 and
 seised; and *Richard Charles* his son and heir, who is
 living, was admitted on the 28th of *October* 1723, and
 ever since been in quiet possession, and the defendant *Fu*

The testa-
 tor F. Eagle
 devised
 thus, " to
 my brother
 Thomas for
 life, then
 to the near-
 est of my
 relations,
 ff. to B. the
 son of Tho-
 mas and his
 heirs for
 ever, and
 after their
 deceases to
 the nearest
 of kindred
 to me, first
 male and
 then fe-
 male; the
 house &c to
 descend to
 the name of
 Eagle, to be
 kept up as
 long as the
 world shall
 endure, and
 never to be
 sold"; held
 that B. the
 son of Tho-
 mas took a
 fee.

7 Mod 296.
 8vo. ed. S.C.

ant to this *Richard. Thomas Eagle* the son died in 1739.
 1732, without suffering a recovery of the premises
 court of the manor, though such recoveries are cus-
 tomary there to bar the issue in tail or those in remainder.
Eagle, the lessor, is son and heir to the last *Thomas Eagle*.

PRESTON
 dem EA-
 GLE
 against
 FUNNELL.

The question is whether *Thomas Eagle*, the testator's bro-
 ther's son, took an estate in fee or in tail by the devise; if
 in fee, then it is for the defendant, if an estate in
 tail then for the plaintiff (a).

The rule of law is plain and clear; and though the words
 of the devise seem a little intricate at first view, yet when
 they come to be considered, they will not, I think, admit
 of much doubt.

If the dispute were between the heir at law and the re-
 sidual man, I should think it a very doubtful case, and
 should think that a court of law ought to be very cautious
 before they carried such an absurd devise into execution, es-
 pecially when it was plainly to create a perpetuity. But the
 question is not now whether the devise in remainder be good
 or not, it having certainly never yet taken place, but whe-
 ther or no this devise over does not plainly shew that the
 testator by these words "*heirs of Thomas Eagle*" meant
 "*the heirs of his body*."

Now the rule of law is that if the first devisee cannot die
 without heirs so long as there are any of those persons in
 being to whom the estate is devised over, in that case the
 first devisee shall only have an estate-tail, for it is plain that
 the word "*heirs*" he must mean "*heirs of his body*",
 otherwise the devise over would be vain and nonsensical.
 If the devise over be to a stranger, in that case the first
 devisee takes an estate in fee; because in that case the mean-
 ing of the testator is doubtful, for he might be mistaken
 in the law and might think that he could limit a fee upon
 a stranger which he could not by the rules of law, and conse-

(a) This case was first argued in *Hilary* term 1738 by *Urrin* Serjt. for
 the plaintiff and *Wright* King's Serjt. for the defendant, and again on the
 10th of *July* in this term by *Eyre* King's Serjt. for the former and *Bellfield*
 for the latter.

quently

1739. frequently such remainder is void. This is now the settled rule of construction of wills of this sort, and was not doubted in any case that I can meet with, except the case of *Hearn v. Allen* in *Cro. Car.* 57; in which case, though the judgment of the Court was against this rule, yet *Yelverton J.* and *Croke J.* both very great Judges adhered to it. And this rule is adhered to in all the other cases that I can meet with as well precedent as subsequent (a). So is the judgment in the case of *Webb v. Herring*, *Cro. Jac.* 416., and 3 *Bull.* 192 (b). The case of *Parker v. Thacker*, 3 *Lev.* 76. is the case of *Nottingham v. Jennings*, *Tr.* 12 *Will. B. R.* reported in 1 *Salk.* 233 (c). But I have a fuller manuscript (d) than the report in *Salkeld*, where it appears to be made by Lord Chief Justice Holt on a trial before him, he said that he should have had no doubt but that a majority of the Judges in the case of *Hearn v. Allen* were of a contrary opinion. But the Court there determined against that authority upon the first argument. And in

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(a) See 1 *Roll. Abr.* 836. pl. 6; *Soule v. Gerrard*, *Cro. Eliz.* 525; *Collier*, 2 *Lev.* 162; *Allen v. Spendlove*, 1 *Freem.* 74; *Lowe v. Davis*, 849; *Pickering v. Towers*, *Ambl.* 363; *Tyle v. Willes*, *Caf. temp. T.* 2 *P. Wms.* 370; *Goodright v. Dunkum*, *Dougl.* 266; *Denn d. Geering v. ton*, *Coexp.* 41; *Doe d. Hanson v. Fylder*, *Coexp.* 833; *Morgan v. G. Corp.* 234; *Porter v. Bradley*, 3 *Hurns. & East* 145; *Doe v. Perry*, 491; *Jess v. Legge*, *ib.* cited in n. 488.—see also *Ginger d. White v. J. Joff* *Tr.* 1742 and *Goodright d. Goodridge v. Goodridge*, *post. Mich.* 1742. for the purpose of this rule a devise over to a person of the half of the first devise is considered as a devise to a stranger, and consequently the first devise takes a fee. *Tilburgh v. Barbut*, 1 *Vez.* 89, and 3 *Att.* 617.

(b) 1 *Roll. R.p.* 398 and 436. S. C.

(c) This case has been since reported in 1 *Ld. Raym.* 568; 1 *P. Wms.* and *Com. R.p.* 82.

(d) The following is probably the manuscript note to which the Chief Justice alluded. "*Nottingham v. Jennings*. In ejectment a case coram *Ld. Holt* for the resolution of the Court was this; *John* seized in fee of the lands in question, and having three sons *John*, *James*, and *James*, he devised them to *Daniel* and his heirs for ever, and if he died without heirs, then to *John* and his heirs. The deviator dies; *Daniel* enters and alienates the land by lease and release to the defendant, and dies without heirs. *John* is likewise dead and his heir is lessor of the plaintiff. The question is whether *Daniel* by this devise had an estate in tail or in fee, adjudged on the first argument that it was only an estate in tail. The word 'heirs' in this case can signify nothing but 'heirs of the body' of the devisee; if it had meant simply and properly heirs in fee, the devise to the brother for want of such heir would be absurd; because so long as the devisee should have a brother, he could not die without heirs in fee; therefore to make the intention of the deviator sensible it is necessary to construe the words to mean heirs in tail. *Webb v. Herring's* case, *Cro. Jac.* 416., is express to this point. And per *Holt*, if the majority of the Judges in *Hearn* and *Allen's* case had not been contrary, I should have made no use of it." *Ms. Coll. Willes* Chief Justice.


dy"; for he might think that he could limit a fee
x, and such his intention could not take place ac-
to the rules of law.

let us try the present case by this rule, and see whe-
mas the brother's son could want heirs so long as the
had any nearest of kin in being, I mean such as
pable of taking lands by descent; if he could not,
is an estate-tail, if he could, then it is an estate in
nd first it was said by the counsel that his brother
would be his nearest relation and yet he could never

Crumble v. Jones, (1) Hil. 7 Ann. 1758,9. B. R. By special verdict
ent it was found that *Anthony Gabb*, being seized of the lands in
d.d devise them to his daughter for life, remainder to *A.* the eldest
daughter and his heirs, and for want of such heirs remainder
to heirs of *J. S.*, who was his daughter's husband. The devisor
the daughter; and afterwards *A.* dies without issue, living *J. S.*
is a life of the heir of the devisor, and the defendant of the
the devise.

as agreed that the remainder to the right heirs of *J. S.* failed,
J. S. was alive at the time when the remainder should have taken
d consequently had no heirs in whom the remainder could vest.
et re the question was between the heir of the devisor and the heir
-wife, whether by this limitation taken together *A.* had a remain-
-or in fee.

it was the clear opinion of the Court that *A.* by this limitation
estate in fee, and that the limitation over was void; for the limita-
-pre to *A.* and his heirs, and the remainder over for want of such
not necessarily shew that the devisor intended that the estate
-s over for want of heirs of his body, for he might mean for want
in fee; and it is but reasonable that the common and legal con-

1739.  take as heir to his son, and that therefore though the should want heirs yet the devise over might give the d to the father. But this argument will not hold, because devise to the testator's nearest relations is not until after decease of his brother *Thomas*, to whom he had given estate for life. It was likewise said that he might have near relations of the half blood, who yet could not take heirs to his brother's son. But to this it was answered as the testator was disposing of lands, he must mean of his relations as were capable of taking lands by descent and therefore must mean of his whole blood; and I am inclined to be of this opinion, and therefore think that it is no conclusion to be drawn from this.

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deni EA-
OLT
against
JOURNAL.

But there is another contingency, which plainly sh that the testator might have nearest of kin capable of tal by descent, and yet his brother's son might die wid heirs; for his brother might marry a second wife and l several children by her, which children would be of name of *Eagle*, which children would be near relation the testator and capable of taking by descent, and yet b of the half blood to *Thomas* the present son of the testa brother could never take as heirs to him.

And I think in this case we should be as desirous as pos to put this construction on the will, both because the de dant claims under a purchaser for a valuable consideration and because it is plain that the testator intended to crea perpetuity if he could by this devise over, which the will not permit. If we were to put any other construc on this, we must also construe it to mean "heirs male & for the deviser has directed that the estate should cont in the name of the *Eagles*; and if it were to descend to daughters, that would defeat the deviser's intention as pressed in this part of the clause.

We are therefore of opinion that the devise to *Thoma* son of the testator's brother must be taken in it's legal natural construction, that consequently he took an estate in and therefore the judgment ought to be for the defendant as this comes before us upon a case, the rule of this Court be according to the rule of *nisi prius*, that the verdict fo
pla

be set aside, and the lessor of the plaintiff must pay 1739.
pendant the costs of a nonsuit."

Above this memorandum was added in Lord Chief
Villiers's Note Book.—Note, "J. W. Fortescue absent,
sent to the judgment."

PRESTON
dem.
EAGLE
against
FORNELL.

AND JONES on the Demise of WILLIAM COW-T. 12 & 13
and THOMAS BROMFIELD against JOHN G. 2.
JESSE Esq. THOMAS WARFORD and ESTHER July 10th.
S.

opinion of the Court was thus given by

Lord Chief Justice. "Ejectment for a moiety of
messuages two gardens two stables and two coach-
houses in *Lincoln's-Inn Fields*.
made before me at the trial in *Middlesex*,
1737, and is as follows.

John Couper Knight was seized in fee of several mes-
suages and moieties of messuages on the south side of *Lincoln's-
Inn* in the parishes of *St. Giles in the Fields* and *St. Dun-
stons*, of which the premises in question are part.
Indenture dated 28th of April 1591 in consideration
of marriage to be had between him and *Anne Sturney* let-
tame to the uses following, as to a moiety of eight
messuages (of which the premises in question are parcel)
he gave and granted unto himself for ninety nine years if he should so-
live, then to trustees during his life to preserve contin-
uance, and from and after his death then to trust-
tees named for 500 years on certain trusts, and after
expiration of the said term to the use of the first fe-
male issue of every other son of the said Sir *John* on the body of
Anne lawfully begotten in tail male, with other re-
servations; and a proviso that it should and might be
enjoyed by the said Sir *John Couper* or any other person that
should or lawfully be in possession of the said premises or

A. tenant
for life hav-
ing power
to grant
building
leases for 61
years re-
serving the
best im-
proved
ground rent
granted a
term, which
was not ex-
pressed to be
a building
lease, but
which con-
tained a cove-
nant by
the lessee to
keep in re-
pair the pre-
mise de-
mised (old
houses) or
sub other
house as
should be
built during
the term; —
Held that
this was not
a building

power.—Such a lease being granted by tenant for life, who had a bare
power without any legal interest, is void, and consequently not capable of being
enjoyed by the remainderman accepting rent.

any

1739. any part thereof by virtue of any of the limitations afore-
 from time to time during their respective lives to make
 JONES dem. in possession but not in reversion or remainder of the
 COWPER premises or any part thereof so as no lease should exceed
 against term of twenty-one years from the making thereof, and
 VERNET. the best rent should be thereupon reserved. The term
 500 years was by consent not to be insisted on by either
 side.

The marriage took effect. And afterwards an act
 made, 2 Anne, to enable Sir John Cowper and Anthony Hen-
 ley Esq to make partition and grant building leases of several
 messuages and tenements in *Lincoln's-Inn Fields* in
 in which act the said settlement is in part recited, and it
 also recited that the eight messuages (inter alia) which
 the said Sir John and Anthony held by undivided moiety
 and in common between them were all or most of them
 much decayed and must of necessity in a very short time
 pulled down to the ground and rebuilt or else the whole
 benefit of the rents thereof would be absolutely lost, and
 no person would undertake to rebuild the same unless
 encouraged by a longer term than twenty-one years which
 the said Sir John Cowper and Anthony Henley were not
 empowered to grant, whereby not only the present interests
 estates of Sir John Cowper and Anthony Henley but also
 in remainder were in danger of being totally ruined or
 much prejudiced, it was therefore enacted that the said
 messuages with their appurtenances should be vested in
 trustees therein named and their heirs, in trust to make an
 partition of the eight messuages between Sir John Cowper
 Anthony Henley, and proper directions are given for that
 pose; and then it is enacted "that it should and might
 lawful to and for the said Sir John Cowper during his life
 and interest in the undivided or divided premises and
 the death of Sir John Cowper as to such of the said premises
 whereof no building lease should be made in his lifetime
 to and for every other person or persons to whom the
 premises are limited by the said indenture after the death
 Sir John Cowper as they should be in possession by virtue
 the said limitations, and in case of infancy to and for
 guardian or guardians of such infants by indenture
 his or their hands and seals, to grant lease or demise

vided or divided moiety of the said eight messuages ^{1739.}
 and being on the south side of the said fields be
 or to belong to the said Sir *John Cowper* with the ^{JONES & CO.}
 ances or of any of them or of any part or parts ^{COWPER}
 at any time thereafter unto any person or persons for ^{against}
 of number of years not exceeding sixty-one years ^{VERNEY.}
 making thereof for the encouragement of rebuild-
 leased premises, so as no such lease be made with-
 eachment of waste by any express words, and so as
 such lease or leases there be reserved to continue pay-
 ing the same the full and utmost yearly ground rents
 old be got for the same with respect to the costs and
 of rebuilding without taking any fine, and so as in
 ch lease there be contained a condition of re-entry
 payment of rent and the usual and reasonable cove-
 and that it should and might be lawful to and for
 ees their executors &c, paying and performing their
 d covenants, to have hold and enjoy the premises that
 e so demised to them during their respective estates
 ns therein."

no partition has been made pursuant to the act.
 erwards Sir *John Cowper* by indenture, 25th March
 made a lease to *Richard Butler* and his assigns of a
 of one of the said eight messuages with the yard &c
 he premises in question) to hold for sixty-one years
 e making thereof. That the said act is recited in the
 enture; and the said lease is said to be made in pursu-
 the said power: but in reciting the power the deed
 at part of it which says that it shall be *for the encour-*
it of rebuilding and reserving the best improved ground
which can be got for the same. The rent reserved by this
 a pepper corn the first year, and afterwards during
 n 45^l. 2-year payable quarterly; usual covenants for
 at of the rent &c: but the only covenant that in the
 lates to building is as follows; "That the said *Richard*
 his executors &c shall at their own proper charges
 ime to time during the term well and sufficiently repair
 maintain and keep the said messuages and premises
 y demised with the appurtenances, *or such other mes-*
se buildings as shall during the said term be built on the
is, in by and with all and all manner of needful and
ry reparations and amendments when and so often

1739. as need shall be and require, and shall leave them so at
 end of the term." There is a clause of re-entry for a
 payment of the rent in 42 days after the days of paym
 And a proviso that in case the premises or any part ther
 should during the term be consumed or in any way impa
 by fire beginning in any other messuage or tenement the
Richard Butler his executors &c should not be compell
 to rebuild or repair the same; and another proviso tha
 the said *Richard Butler* his executors &c should at the
 of the first forty years of the term be minded or desirous
 determine the lease and estate thereby granted, and sho
 give notice of such his mind and desire in writing to the
 Sir *John Cowper* his heirs or assigns or to such person
 whom the remainder or reversion of the premises expect
 upon the said term should then belong or to the person
 thorited to receive the rent for the space of twelve mon
 next before such his desire and intention, then and in f
 case the term and estate thereby granted should at the end
 the said twelve months next after such notice absol
 cease and determine according to the intent and meaning
 such notice. That the said *Richard Butler* duly execut
 counterpart; and that the rent reserved was the full ye
 value of the premises.

JONESDEM
 COWPER
 a. uiff
 VERNEY.

That *Richard Butler* soon after making of the said
 indenture entered on the premises, and being so poss
 erected and built on part of the premises two new messu
 now in the possession of the defendants *Warford* and *B*
 and also a coach-house and stable now in the possession
 the defendant *Verney*; and that the moiety of the said cap
 messuage and the rest of the premises in the said indent
 of demise contained are now likewise in the possession of
 said defendant *Verney*.

That *John Burnett* by virtue of an assignment from the e
 cutors of *Richard Butler*, dated 22d of *November 170*
 was entitled to all the remaining interest in *Richard But*
 lease of the 25th of *December 1704*. That *Richard But*
 and *John Burnett* respectively duly paid the reserved rent
 the said Sir *John Cowper* during his life; that he died
 the 23d of *October 1729*; and after his death *John Burn*
 continued in possession of the premises and paid the reserve
 rent of 45*l.* a-year for two or three years after the death
 Sir *John Cowper* unto the lessor of the plaintiff *Willi*
Cowper, the eldest son of Sir *John Cowper* by the said *An*

Sturmy

MY TERM, 12 & 13 GEO. II. C. P.

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at the lessor *Thomas Bromfield* is the only sur-
under the said act; and that the other three
etime of *Sir John Couper*.

1739.

JONES lem.
COWPER
ag. Sir J.
VERNEY.

on that was reserved upon this case was the ge-
n, whether the lessors of the plaintiff or either
entitled to recover the whole or any and what
remises. And this question will depend upon

har the leases, which *Sir John Couper* &c.
ered to make by the statute 2 An. for the term
years were to be *building-leases*;
ey were, whether the lease under which Mr.
na, was such a building lease;
he two first points should be against the defen-
er Mr. *Couper* the lessor has not confirmed this
pstance of the rent from the lessee.

idence was laid before me in a very confused
e trial, and as it is a case of some value, I was
to have the opinion of my Brothers; but now
as been fully spoken to (a), and every thing has
o the bottom, it is, I think, a very plain case.

first point; we are all clearly of opinion that the
y-one years, which *Sir John Couper* and others
ered to make by the statute 2 An., were intend-
ding leases; not leases only for the encourage-
uilding, as was endeavoured to be made out by
ingenious arguments by my Brother *Burnett*
(last for the defendants,) but leases by which the
d be *obliged to rebuild*, and in which there should
rent reserved and proper covenants for that pur-
agree that in the construction of acts of parlia-
ill public as private, the intention of the Legis-
to be enquired into, and when that appears plain
he greatest regard ought to be had to it. But
a must be collected from every part of the act,
art of it shews that these were designed to be

le was argued by *Prime* and *Wright* King's Serjts. for the
y *Skinner* King's Serjt. and *Burnett* Serjt. for the defendants,
May and 29th of June 1739.

building

1739. *building leases.* The act is entitled "An Act to enable *John Couper* and *Mr. Henley* to make a partition and *building leases.*" In the recital one of the reasons assigned for making the act is that most of the houses were very decayed and must of necessity in a short time be pulled down to the ground and rebuilt, or else the whole benefit of the rents thereof would be absolutely lost, and that no person would undertake *the rebuilding* of the same unless encouraged by a longer term than twenty-one years, whereby the present estates and interests of *Sir John Couper* and *Mr. Henley* and also of those in remainder were in danger of being totally ruined or very much prejudiced; by which words it is plain that those who were to have leases for sixty-one years were to undertake to rebuild. In the power itself it is said that *Sir John Couper* and those who come after him may make for leases sixty-one years of such of the premises of which he had made no building lease in his lifetime. In the description of these leases indeed it is only said "for the encouragement of rebuilding;" and these are the only words in the act from whence any inference can be drawn against half of the defendants. But to put this restrained construction on the words, and to determine that it was only intended that leases might be made for sixty-one years which term would be an encouragement to lessees to rebuild, that they were to be left at liberty whether they would build or not, is to contradict the plain intent of the act expressed in every other part of it. First, the title and recital as I have already observed, shew this. In the next place the words made use of in the beginning of this very clause which gives the power it is plain that *Sir John Couper's* was to be building leases; and it could not be intended that those who were to come after him were to have a larger power than him: besides this question arises on a lease made by him. And then the words at the latter end of this clause make it still stronger; for the rent which is to be reserved is to be full and utmost yearly ground rent that could be gotten in respect to the costs and charges of rebuilding. We have therefore no doubt upon this first point, but are all agreed that it ought to be a building lease.

dly; And we have as little doubt upon the second; 1739.
 cannot be considered as a building lease within the
 of the act. There is no power given to the lessee
 down and rebuild any part of the premises, nor any
 upon him to do so, nor any covenant for that pur-
 And in the very recital of the power that part of the
 gement of rebuilding and that relating to the refer-
 the best ground rent that could be gotten with re-
 the charges of rebuilding seem to be purposely
 . A reasonable covenant in a building lease must
 y be meant of a covenant to build: but there is none
 this lease. It was insisted indeed that the covenant
 ir and uphold implies this, and several cases were
 this purpose: but it was very well answered that at
 his only relates to rebuilding in case the buildings
 fall down, but that there is nothing in this lease that
 ses the lessee to pull down the buildings, nay that it
 be waste if he should (a), and the lessor may besides
 n action for the materials when pulled down. Be-
 e best improved rent is reserved without any regard to
 arges of rebuilding was not in the contemplation of
 ties at the time of making the lease. The proviso
 e that the lessee should be at liberty to quit the
 as at the expiration of forty years affords another very
 argument to this purpose. For though I do not
 e makes the lease itself void, yet it shews plainly that
 is not intended to be a building lease; for if the lessee
 en to rebuild, he would have been desirous to keep
 mises as long as he could, and would never have de-
 liberty of quitting the premises before the end of the
 But this liberty could be inserted with no other view
 t the premises should become so ruinous before the end
 term that the lessee should not think it worth his
 to keep the premises in repair at a great expence and
 the same time the best improved rent for them.
 is found in the case that he has in fact voluntarily
 wo houses &c on the premises will make no alteration
 case, first, because he has not pulled down the old

JON. & DEM.
 COWPER
 against
 V. LANEY.

C. 63. The old law on this subject was so strict that if the lessee
 own a house and built another in its room *not so large*, 22 Hen. 6. 18.
 even larger, Co. Lit. 53. a., it was waste. But see *Mollineux v.*
 3 P. Wms. 268. n. F.


1739. house which was ruinous and rebuilt that, which was intended by the act; secondly, but principally, what he has done since more than he was obliged to do by the lease certainly cannot make the lease good: which is void ab initio, according to that known rule in the law, *initio non valet tractu temporis non potest convalescere*. If a lease were made by a person, who ought to reserve a sufficient rent, reserving a much less, it might as well be that the lessee may make it good by consenting to pay an ancient rent afterwards; and yet such a notion was never thought of and would be most absurd. We think that that this can make no alteration at law, though it is an equity; for the lessee, if evicted, will probably be able to obtain satisfaction there for the lasting improvements which he has made.

JONES & M.
COWPEL
against
VERNEY.

What was inferred from several cases and several acts of parliament which were cited to shew that a much less than sixty-one years has been considered as a sufficient term for the encouragement of rebuilding was all that could be said on the subject, but is we think of no weight; for we must construe this power as it is and as it appears on the face of itself. The rules concerning the construction of powers seemed to be agreed on both sides, and therefore I need not say any thing upon them; and likewise because the powers were intended only to create building leases, as we are clearly of opinion that it was, it is beyond dispute that the power has scarcely been pursued in any part of it.

Thirdly; As to the last point I shall say but very little, because it is undoubted law that though an acceptance of a lease may make a voidable lease good, it cannot make valid a lease which was actually void at first (a). And it is as

(a) "It is to be observed that where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it have a continuance, otherwise it is of an estate or lease voidable by condition. *Co. 1 lit. 215. a.* See also *Finch v. Throckmorton*, Cro. Eliz. 221; *Co. Lit. 1 b*; Bro. tit. "Lease," pl. 1. and 18; 3 Co. 64. b; *Rickman v. Garth*, 4 Jac. 173; *Dee d. Simpson v. Batchelor*, Dougl. 50; *Goodright d. Wynne*, *Hampbry*, *ib.* in not. 51; *Jenkins d. Tate v. Church*, Cowp. 48.; and *Stuart v. Watts*, 2 Durnf. & E. 83. But in *Goodright d. Carter*, *Stuart*

lease was actually void and not voidable only, for 1739.
Cowper had only a naked power at the time of 
 and no legal interest to which the power could be JONES dem.
 for the whole legal interest was vested by the sta- COWPER
 trustees, and he at the most had only an equitable against
 which no legal power can be annexed. And if a VERNEY.
 a naked power make a deed or a lease not war-
 his power, such deed or lease is certainly void
 voidable only. If it had been otherwise, notwith-
 what was said to the contrary, I should have thought
 acceptance of the rent by the cestui que trust would
 have made the lease good, and that it would even
 n better than the acceptance by the trustee: but
 being absolutely void, the acceptance by either of
 signify nothing.


therefore all of opinion that judgment ought to
 plaintiff; and as the verdict is already for him,
 must be delivered to him in order that he may en-
 judgment."

APNER on the Demise of RICHARD PECKHAM Trin. 12 &
 PALMER and ROBERT BALL against JOSEPH 13 Geo. 2.
 OTT and HENRY PRIOR. Wednes-
 day,
 July 11th.

18 Lord Chief Justice delivered the opinion of the There must
 t as follows; be a actual
 entry to
 avoid a fine.

ment of the manor of *Keynor* and a messuage and 7 Mod. 297.
delebam in the county of *Sussex*. S. C. oct.
 ed.
 mes before the court on a case made by Mr. Baron
 at the assizes held for the county of *Sussex* on the
 July 1737, which case is as follows. Sir *Thomas*
 s seized in fee of the premises in question, and on
 ge of his daughter *Elizabeth* with *John Farington*

201. it was holden that a redelivery of a lease made by way
 by a feme after the death of her husband, which had been de-
 er while she was covert, was a confirmation of the deed to
 out a re-execution, and that circumstances alone might amount
 livery, though the deed was a joint deed by the husband and
 the lands of the wife.

1739.  eldest son of Sir Richard Farington in consideration of intended marriage and of love and affection to *Elizabeth* by lease and release 19th and 20th of February, 9 he settled the premises to the use of himself and his heirs by the marriage, and afterwards to the use of *John Farington* and his assigns for ninety-nine years if he should so live without impeachment of waste, then to trustees for his life to preserve the contingent remainders, and from after his death to the use of *Elizabeth Miller* for her jointure, and from and after their deaths to the use of the first and every other son of the said marriage in tail general, remainder to every after-born son in tail general, remainder to the first and every other daughter of the said marriage in tail general, remainder to every after-born daughter in tail general, remainder to every after-born daughter and for default of such issue to the use and behoof of the said *John Farington* for ever.

dem. PECKHAM
ag. vs. MERLOTT.

The marriage took effect, and *John Farington* lived and was in possession during his life, and died on the 2nd December 1718 without any issue born in his lifetime or at his death. *Elizabeth* his wife survived him, and died of the premises on the 5th of July 1736.

The lessors of the plaintiff are the heirs at law of *Farington*.

John Farington duly made and executed his will in writing on the 7th of May 1718, and devised all the messuages farms lands tenements and hereditaments freehold and copyhold whereof or wherein he or any other persons in trust for him had any estate of freehold or inheritance in possession reversion remainder or expectancy situate lying or being in the kingdom of Great Britain or elsewhere unto his uncle *John Merlott* his heirs and assigns for ever.

John Merlott duly made and executed his will in writing on the 24th June 1731, and devised to the defendant *Joseph Merlott* and his heirs for ever all that his reversionary estate or known by the name of *Keynor's farm* in the parish of *Sidleham* in the county of *Sussex* with the appurtenances thereto belonging, and died soon after in the lifetime of *Elizabeth*.

The defendant *Joseph Merlott* is son and heir at law of *Merlott*.

After the death of *Elizabeth* viz. 6th July 1736, possession was taken of the estate in question in the name and on behalf of the defendant *Joseph Merlott* by virtue of a

aires, in *Trinity* term 10 *Geo.* 2. and in the year
viz, from the day of the *Holy Trinity* in three weeks
fine sur conuſance de droit come ceo &c before his
s Juſtices at *Weſtmiſter*, which fine was afterwards
and recorded in the Court in eight days after the
ion of the Bleſſed Virgin *Mary* in the ſame year,
afterwards three times publicly and ſolemnly read
claimed in the ſaid court according to the form of
utes &c; viz., the firſt proclamation thereof 12th
in *Hilary* term in the ſame year 1736, the ſecond
both of *May* in *Eaſter* term 1737, and the third on
b of *June* in *Trinity* term 10 & 11 *Geo.* 2. and in
year 1737, and no other proclamation was had or
creupon at the time of the ſaid trial.

laintiff at the trial did not give any evidence of an
ntry made by the leſſors of the plaintiff upon the
question after the ſaid fine levied, but the defendant
al confeſſed leaſe entry and ouſter according to the
rule entered into by him.

neſſions reſerved for the opinion of the Court were

That eſtate the deviſor *John Farington* had in him at
of the deviſe.

What was the operation of the fine levied by *Joſeph*
he heir and deviſee of *John Merlott*.

Whether the leſſors of the plaintiff could maintain
ment without an actual entry.

1739. As to the first; we are of opinion that *John Farington* the devise to *John Merlott*: so it is expressly held in *Ca.* 319; and I know no case to the contrary. If indeed *Farington* had had an estate for life, he would have had a simple, because the last remainder was limited to him and his heirs; but it has never been extended further. This general rule seemed to be agreed to on all sides: two answers were endeavoured to be given to this; 1st, That the word *assigns* plainly shewed that it was intended that inheritance should vest in *John Farington*; 2dly, That being a conveyance made by way of use must be construed in a different manner from a conveyance of a legal estate and that, as in a will, the words must be construed according to the intent of the parties. As to the 1st; an answer was endeavoured to be given that *assigns* must mean *assigns of the heirs*: but that I think was by no means satisfactory, because it is expressly said the "*assigns of John Farington*". But another answer suggested itself to me this morning, on which I will give no mature opinion, because there is no occasion, but I think there is some weight in that this word, though it does not alter his own estate, might give him a power of disposing of it. For suppose this last remainder had been to him and his heirs, or to such persons as he should appoint, he might certainly in that case have disposed of it by his will, and I am inclined to think as at present advised that the word "*assigns*" may admit of this construction. But I say this only by the bye, and only my private opinion, which occurred to me this morning, there being no occasion to give any resolution on it, as we are all of opinion for another reason that the plaintiffs cannot recover in this ejectment.

As to what was insisted upon that a conveyance to use should be construed as a will and in a different manner from other conveyances, we are all clearly of a contrary opinion. For since the statute of uses an use is turned into a legal estate to all intents and purposes; it must be conveyed exactly in the same manner and by the same words; and if it were otherwise, as most conveyances are now made by way of use, endless confusion would ensue. A case indeed was cited, and much relied on, to establish this doctrine

(a) Vid. 3 Atk. 734; and *Dec d. Muffell v. Morgan*, 3 Durnf. & Est. 46, accord.

was the case of *Leigh v. Brace* reported in *Cartbaw* 1739: and 5 *Mod.* 266 (a); in the first book said to have adjudged in *B. R. Hil. 6 W.* and in the last *M. 8 W.* words of that deed were thus; an estate was vested in fee in fee to the use of the grantor for life, then to the said *Thomas Brace* his son and his heirs, and for default of the body of the said *Thomas Brace* then to the heirs of the body of the grantor. The special verdict is set in 5 *Mod.*, and I have compared it with a copy of the which has been brought to me; and in that case it did certainly determine that *Thomas Brace* the son only an estate-tail; but in 5 *Mod.*, where the case is largely and more particularly reported than in *Cartbaw*, is not one word said of any difference between a conveyance by way of use and any other conveyance: But the sign (appearing there) is founded upon other determinations in respect to legal conveyances; as the case in *21. a.*, where it is held that if a man make a feoffment to another and his heirs, habendum to him and the heirs of his body, he shall have an estate-tail; and a case of the 37 *Lib. Ass.* 15, long before the statute of uses, cited for that purpose. Another case was cited from *4. 6. 74.*, that if a feoffment be made to a man and his heirs, and if he die without heirs of his body, remainder, this is an estate-tail. They considered therefore words in this deed as one sentence, and the latter as explanatory of the former. And they cited likewise *Beck's* case, cited in *Lit.* 344, where a feoffment was made to the first and his heirs and for default of such issue remainder. But the Court, as appears by the report in 5 *Mod.*, said not one word about the statute of uses, but said they considered it just in the same manner as if a gift were made to a man and his heirs, viz., to the heirs of his body. Indeed said in *Cartbaw*, where the case is very shortly reported, that the Court laid a great stress upon it's being a conveyance by way of use, which conveyances they said were always construed as wills, and that they were not bound to the strict forms of conveyances at common law, but it was so adjudged on the same deed in *B. C.* special verdict. I own that *Cartbaw* is in general a

APNER
dem. PECK.
HAM
against
MERLOTT.

(a) 1 *Lord Raym.* 101, and 3 *Salk* 337, S. C.

1739. very good and a very faithful reporter; but I fancy he is mistaken here, because I cannot think that the Court would give so absurd a reason for their judgment, especially since there is not a word said of it in 5 *Modern*, where the facts and the arguments upon it are very particularly reported. However if this had been as *Cartbrow* reports, yet in a single case, it is contrary to reason and common experience, and such a determination would make such a confusion in all the property of the people of this kingdom; that I think I should have no regard to it but think that the contrary ought to be declared to be law.

TAPNER
dem. PECK-
HAM
against
MERLOTT.

As to the second question, what is the operation of a fine, there may be some difficulty to determine it, and as there being no necessity we shall give no opinion upon it. I shall only say that it appears by the examination of the officer that a fine is not said to be engrossed till it comes to the Clerk of the Peace, and he makes out the several parts of it; and it is never proclaimed, nor can it be so, until it is brought to him and engrossed, though it may operate as a fine with proclamations from the time when it was first levied. I shall we determine whether or not this is to be considered as a fine with proclamations or not, the action being brought before the time when all the proclamations were expired, and all the proclamations being made that could be made before that time; because it is clear that this was a fine of one sort or other, and there is no pretence to say that the fine was void; and if not,

Thirdly, We are all of opinion that when a person in possession levies a fine of any sort, the parties out of possession cannot maintain an ejectment without an actual entry. There was no distinction made by the Judges in the resolution which they came to in the 2d of *Anne* between this or any other sort of fine: but their resolution was general, that there must be an actual entry in order to avoid a fine (a). This resolution in the case of *Little v. Henton*, *Salk.* 259, in which were cited the case of *Withers* and *Gibson* 3 *Keb.* 218, and the case of *Pye v. Bulling* 1 *Ventr.* 332, extends to

(a) *Berrington v. Parkhurst*, 2 *Str.* 1085; 4 *Bro. Parl. Cas.* 353; *Faulkner v. Adams*, 2 *Str.* 1128; *Owens v. Brydon*, 3 *Burn.* 1897; *Goodtitle v. Goodtitle*, 4 *Dough.* 486; and *Doe d. Compere v. Hicks*, 7 *Dur. f. & E.* 433: but it has since been determined that it is not necessary in the case of a fine at common law. *Jenkins d. Harris v. Prichard*, 2 *Will.* 45.

an entry for nonpayment of rent; and the reason given 1739.
 in all these cases is that the confession of lease entry
 was sufficient. As this has been so long settled, ^{APNER}
 not for altering it now: but were it a new case, I ^{dem. PECK-}
 be of a different opinion even in respect to an entry ^{HA ..}
 payment of rent, because the reason given for it is ^{against} ^{MERLOTT.}
 the confession of the entry in the rule being only
 sion of the entry of the nominal plaintiff and not
 sion of the entry of the lessor. Though therefore
 think myself bound by this rule, which has been so
 established, as far as it goes, yet I am so little satisfied
 e reason of it that I shall never be for extending it
 farther.

out therefore giving any positive opinion on the two
 ints, as we are all agreed on the third and have not
 t doubt, the verdict given for the plaintiff must be
 : according to the rule of nisi prius, and the plaintiff
 y the costs of a nonsuit."

it in *Oates d. Wigfall v. Brydon*, 3 Burr. 1897, Lord Mansfield, in
 the opinion of the Court, said "To avoid a fine there must be
 entry: and the demise cannot be carried back beyond the actual
 . In all other cases the confession of lease entry and ouster is suffi-
 nd so it is now settled that it is sufficient for an ejectment brought
 addition broken."

it has since been ruled in *Compere v. Hicks*, 7 Durnf. & East 727,
 erty after he has made an actual entry cannot recover the mesue
 at accrued before.

ROBINSON *against* TUCKWELL.

21. 13 G. 2.
 Thursday,
 Oct. 25th.

RIGHT Serjt. shewed cause against a rule to set
 aside an execution in an action brought upon a judg-
 the defendant in the first action for the costs, be-
 writ of error had been brought and allowed on the
 nt in the first action.

The Court
 refused to
 set aside the
 execution
 in the se-
 cond action,
 (a writ of
 error hav-
 ing been
 brought on
 the first
 judgment.)
 because the
 defendant
 had not be-
 fore applied
 to stay the

he objected against the rule, because there was no
 to stay the proceedings in the second action, in
 ase the Court would have ordered the plaintiff not to
 t execution so long as the writ of error was depend-
 t would have given him leave to proceed to judg-
 And he insisted that there being no such motion the
 proceedings in the second action: Sir G. Co. 159. S. C.

plaintiff

1739. plaintiff was at liberty by the course of the Court to take execution in the second action notwithstanding such writ of error. And he cited the case of *Humphreys v. Daniel* in this court, *P. 9 Geo. 2.*, where this point was expressly determined. Besides he insisted that no bail had been taken in upon such writ of error, and that therefore it lay for nothing.

ROBINSON
against
TUCK-
WELL.

Eyre Serjt. contra.

No bail was necessary, because this was an action on judgment only for costs; which was agreed. And as to principal objection, he relied on the reason of the case, because otherwise there might be a contrariety of judgment. But he admitted that the common practice is to apply to the Court to stay the proceedings.

Rule discharged by *The Court*, according to the case of *Humphreys v. Daniel*, which was agreed to be as cited (*b*).

(*a*) *Barnes* 202; and *Sir G. Co.* 129. (*b*) See the next case of *Clarkson v. Physick*.

M. 13 G. 2.
Thursd. 7,
Nov. 8th.
S. P.
Barnes 203.
S. C.

CLARKSON against PHYSICK.

“ ACTION on a judgment. Writ of error on the judgment. The plaintiff in the action had proceeded to judgment and taken out a *capias ad satisfaciendum* which had been delivered into the hands of the sheriff and warrant made out, but it was not actually executed before the motion. The defendant had never applied to the Court but now moved to stay execution in the second action on reason of the writ of error depending on the first. And

Comyns Serjt. for the defendant endeavoured to distinguish it from the case of *Robinson v. Tuckwell* (*a*) and the case of *Humphreys v. Daniel* there cited, because in both those cases the execution was actually executed before the motion.

But *The Court* were of opinion that this was a distinction without a difference, and that the defendant, if he would stay

(*a*) The preceding case.

execution

n for this reason, ought to apply before judgment. 1739.
 r the matter was compromised; and a rule was en-
 o by consent that upon the defendant's bringing the
 to court, and agreeing to bring no writ of error on
 and judgment, the proceedings on the execution
 e stayed until the writ of error was determined".

CLARKSON
 against
 PURICK.

WANT against SWAYNE.

M. 13 G. 2.
 Thursday,
 Oct. 25th.

RULE had been obtained against *Hutchinson*, adm- The Court
 nistrator of *Duckworth* deputy bailiff of *Simpson* chief refused to
 the Honor of *Pontefract* in *Yorkshire*, to shew cause order the
 should not pay a sum of money recovered by *Want* administra-
Swayne, for which a writ of execution had been liff (to
 it and the warrant delivered to *Duckworth* and whom an
 money was alleged to have been received by *Hutchin* execution
 the death of *Duckworth*. had been
 delivered)

now, upon shewing cause, the case came out to be
 warrant was delivered to *Duckworth*, in his lifetime,
 ead of executing it as he ought having some money
 o him from *Swayne* took a security from *Swayne* for
 money and the money due to *Want*, and after the
 f *Duckworth Hutchinson*, as his administrator, re-
 be whole money of *Swayne*. *Hutchinson* in his affi-
 d not deny the receipt of the money, but insisted
 first when he received the money he did not know
 of it was on the account of *Want*'s execution, that
 out administration as a considerable creditor of *Duck*-
 and that he had either retained or paid to the cre-
 f *Duckworth* more money than he had received, and
 had no assets in his hands.

to pay over
 to the plain-
 tiff the mo-
 ney which
 he had re-
 ceived after
 the bailiff's
 death.

Court were of opinion that they could give *Want* no re-
 this summary way, but left him to pursue his re-
 law or in a court of equity as he could; but seem-
 hink him without remedy, because he could not be
 er condition than if *Duckworth* had actually receiv-
 money on the execution, in which case *Want* would
 only

1739. only have been a creditor on simple contract, and the administrator might have preferred any other creditors in payment or retained to pay himself."

WANT
against
SWAYNE.

JOHN MARRIOTT *against* ELIZABETH THOMPSON
Executrix of WILLIAM THOMPSON. (a).


M. 13 G. 2.
Wednesday
Nov. 28th.

[H. 12 GEO. II. Rol 1.85]

If the bond
(on marriage) be
given to
trustees,
conditioned
to leave the
intended wife
a sum of
money, and
the wife be
made the
executrix
of the obli-
gation, they may
retain the
amount of
the bond,
and plead
such retain-
er to a condi-
tion brought
against her
by another
bond creditor
of the
husband.

DEBT on a bond of the testator, dated 30th Jan 1732 in the penalty of 100*l*.
The defendant prayed oyer of the bond and condition which is for the payment of 50*l*. and interest on the 3 July then next. And then pleaded that *W. Thompson* husband before her marriage, on the 22d of July 17 became bound to *Eleanor Baldwin* and *W. White* in penal sum of 800*l*., with condition that if the said *W. Thompson* should at his death leave to the said *Elizabeth*, his intended wife, if the said marriage took effect and she should survive him, the just sum of 400*l*., free and clear from all debts, demands and incumbrances whatsoever, then the said obligation should be void. And she further pleaded that the marriage took effect; and that her husband on the 17th of December 1735 made his will and appointed her sole executrix and died on the 25th of September 1737; that she proved will 10th October 1737; and that the said *W. Thompson* not at his death leave to the said *Elizabeth* the said 400*l*. any part thereof, but the same is still unpaid, and the bond is still in force not cancelled annulled or in any way satisfied. And the defendant further pleaded that she fully administered all the goods and chattels which were the said *W. Thompson* at the time of his death in the hands of the defendant to be administered, except goods and chattels to the amount of 5*l*.; and that she hath no more; will pay the trustees out of the assets, or pay out of her own money and retain assets proper or confess judgment to the trustees to cover assets.

(*) This case is reported in 7 *Mod.* 293. oct. ed, but without the judgment of the Court. In page 293 an opinion is supposed to have been given by *Page* and *Denton* Justices but that is evidently a mistake, Mr. J. being a Judge of *B. R.* and Mr. J. *Denton* was not in court when this was decided. The whole of that paragraph is probably the argument of counsel and "*Page and Denton*" the name of a case on this subject reported 1 *Fest.* 54, on which the counsel were commenting.

is sufficient to satisfy to the said *Elizabeth* the said 400*l.*, 1739.
 which are bound subject and liable to the said *Elizabeth* 
 payment and satisfaction thereof and which she retained MARRIOTT
 and hath a right to retain in her own hands towards satis- against
 faction thereof; and so prays judgment of the action. THOMPSON

The plaintiff demurred generally, and the defendant joined
 in murreur.

Field Serjt. and *Wynne* Serjt. for the plaintiff (*b*) took
 objections to the plea.

1. That the defendant could not retain, because the bond
 made to trustees and not to her; but that if she would
 covered the assets, she should have caused the trustees to
 brought an action against her and have confessed judg-
 ment in such action. That the words in the condition are
 and not *pay*; and that if the 400*l.* mentioned in the
 action could be considered as a debt due to her, it was at
 but a debt on simple contract, and therefore she could
 retain it against a bond creditor.

2dly, That the plea is inconsistent with itself; for she in-
 at first that no part of the 400*l.* is paid, and yet after-
 wards admits that she has 5*l.* in her hands, which she has re-
 ed towards satisfaction thereof.

Per Curiam (*Denton* J. absent, but agreeing with us)

The justice and equity of the case being with the defen-
 t, we ought to go as far as we can to make her plea good,
 especially since she has acted a very fair and honest part.
 she might, by confessing judgment to her trustees, have
 red assets to the amount of 800*l.*, within the rule that was
 down in *B. R.* in the case of the *Bank of England* v.

) Vide *Clift's Ent.* 349; *Thompf.* 156; 2 *Brown.* 73; *Vidian's Entr.* 188.
 This case was twice argued, the first time in *Easter* term 1739 by
W Serjt. for the plaintiff and *Draper* Serjt. for the defendant, and on
 7th of *October* 1739 by *Wynne* Serjt. for the former and *Burnett* Serjt.
 for the latter.

Morrice;

1739. *Morrice* (a); for she had it not in her power to prevent penalty of the bond being forfeited.

MARRIOTT
against
THOMPSON

That an executor may retain for a debt due to himself against any creditors in an equal degree is undoubted; and it would be endless to cite cases to that purpose; and plain reason of it is, because he cannot sue himself, and law will never suffer that a right should be without a remedy.

But the objection here is that the bond is not to the executrix herself, but to the trustees, and so the debt in point of law is due to them. If the money in the condition had been to have been paid to them, though in trust for her, there would have been something more in that argument, and we should have been of opinion in that case that the plea, as pleaded, would not have been good. But though she could not in that case have retained, she might have paid the money to the trustees and insisted on the payment, or she might have paid it out of her own money and have retained assets pro tanto. For that an executor, if he pay his testator's debts out of his own money, may retain assets pro tanto against creditors of an equal degree is expressly held; *Dyer* 2. a.; *Moore* 2; *Cloydon v. Spensar*; 2 *Roll. Abr.* pl. 11; and in several other books.

But in this case the payment in the condition being to the executrix herself (c.) we are of opinion that she may retain sufficient to satisfy it according to the case of *Rogbelly v. Godolphin* reported in *Raym.* 483, 2 *Shew.* 403, and by the name of *Beskellet v. Godolphin*, in *Skinner* 214, and adjudged in *B. R. M.* 34 *Car.* 2., which is a case almost in point.

(a) Since reported in 2 *Str.* 1028; *Rep. temp. Hardw.* 219; and 41 *Parl. Caf.* 287.

(b) Or in trust for another. Vide *Plumer v. Marchant*, 3 *Burr.* 1380. An executor de bonis torti cannot retain in satisfaction of his own debt. *Vaughan v. Brown*, 2 *Str.* 1106. and *Curtis v. Vernon*, 3 *D. & E.* 590.

(c) And where the promise or bond is made to the intended wife herself without the intervention of a trustee, the promise or bond is not released by the marriage; and if the wife be made executrix, she may retain in satisfaction of such debt. *Cage v. Action*, 12 *Mod.* 290; *Com. Rep.* 67; *Salt.* 3 and 1 *Ld. Raym.* 511.; *Cannell v. Buchle*, 2 *P. Wms.* 142; *Milbourn v. Ewart*, 5 *Durnf. & E.* 381; and *Hays d. Feord v. Feord*, there cited, 38

and was given before marriage to two trustees, con-
 pay to the defendant the widow 3000*l.* within 1739.
 days after the husband's (the testator's) death: it
 that the widow being executrix might retain suffi-
 ly herself that 3000*l.* The only difference between
 is that it is *leave* in one and *pay* in the other. But
 think, makes no material difference for that
 is the same as "pay" (a). MARRIOTT
 against
 THOMPSON

the objection that this must be considered as a debt
 : contract, we think there is no weight in it. For
 r a man by deed obliges himself to pay money to
 it is a debt by speciality; and if it were otherwise,
 y to be paid by the conditions of bonds must be confi-
 : debts on simple contract if the bond be not for-
 n the lifetime of the testator, which was never yet
 ed.

the second objection; the merits being clear with
 endant, we will endeavour to make the plea good if
 ; and we think that the objection may easily be got
 To be sure, it might have been pleaded better: but
 ik that the plea may be so construed as not to be in-
 nt. For no assets might come to the defendant's
 immediately on the death of the testator, but
 onfessed by the plea might come to her hands after-

And as to those words "the same is still unpaid";
 : (as it may) be taken to relate to the whole 400*l.*
 is no repugnancy; or if it be construed to any part
 it is true; for he was to leave her 400*l.* free and
 rom all debts demands and incumbrances whatsoever;
 is the 5*l.* confessed would certainly be liable to pay the
 ff's demand if she did not cover it in the manner in
 she has done.

gment therefore was given for the defendant."

and so it was ruled in *Cockcroft v. Black*, 2 P. Wms. 298. (though
 order adds a quære to it) and in *Loane v. Cossey*, 2 Bl. Rep. 965.

1739.

M. 13 G. 2.
Wednesday
Nov. 28th.

SLAUGHTER, by his next Friend **THOMAS MUI**
against **TALBOTT**.

A RULE nisi had been made against the prochein amy for an attachment for nonpayment of the costs, judgment having been given against the plaintiff and the costs taxed.

Eyre Serjt. shewed cause against the rule; and that the prochein amy ought not to be liable to costs being no judgment against him. And he said the officers of the court were formerly appointed guardians and prochein amies to sue and defend for infants, and the Court could ver intend to subject them to costs. He cited 2 *Inf.*

And insisted that they ought to be no more liable to than attornies.

Skinner Serjt. contra insisted that this is the only way why guardians and prochein amies are appointed, in order to be responsible for the costs, because the infants are. And he cited the case of *Englefield v. Round*, Hil 1726.

I was of opinion that the rule must be made absolute; however the practice might be anciently, the officers of court are not now usually appointed either guardians or prochein amies. And the practice was probably altered for this very reason, because they would be liable to costs. It is probably for this reason that they do appoint attornies for otherwise I see no reason why an infant may not as well appoint an attorney by the leave of the court as a prochein amy. An infant by law may make a presentation to a benefice, though of never such tender years. The argument that there is no judgment against the prochein amy is of little weight; for there is no judgment against the lessor of plaintiff in ejectment.

Mr. J. *Fortescue Aland* was of the same opinion; and said that it had been so frequently adjudged in *B. R.* when he sat there. The prochein amies may have satisfaction over against the infants, and generally they take security.

(a) Sir G. Co. 32; and *Koper v. Harrison*, there cited, S. P.

W. Fortescue was of the same opinion; and said 1739.
Court of Chancery, if a motion be made to change
in any, always refer it to the Master to see if the
proposed in his room be a proper person.

SLAUGH-
TER
against
TALBOTT.

rule was made absolute."

DAVIS *against* MANSELL.

H. 13. G 2.
Friday,
February

MOTION by the plaintiff after issue joined to have
the money out of court and costs to the time of
it in, the plaintiff offering to pay to the defendant
afterwards when taxed.

If plaintiff
proceed af-
ter the de-
fendant has
paid money
into court,
the Court
will before
trial allow
him to take
it out with
costs to the
time of pay-
ing it in,
on his pay-
ing the de-
fendant his
subsequent
costs.

ought this motion not reasonable, unless the plaintiff
pay the defendant the whole costs of the suit to this
he would be entitled to them in case the plaintiff had
to trial and had recovered no more than the defen-
d brought in; it being the plaintiff's fault that he
did so far without taking the money out.

the prothonotaries certified that the course of the
as otherwise; And

Mr *Fortescue Aland* agreed with them that the plain-
tiff take out the money at any time before trial, and
be entitled to costs till the time of the money brought
should only pay the defendant costs for the proceed-
afterwards (a). The case of *Savage v. Franklin* (b),
Geo. 2. was cited to this purpose; and the prothono-
id that there was a multitude of cases of the same sort.

Barnes 282.
Prac. Reg.
255. S. C.

his coming on upon the defendant's shewing cause
a rule which had been made nisi before, the rule was
absolute (c)."

see *v. Mitchell*, Barnes 284; and *Hurtley v. Batson*, 1 D. & E.

Barnes 280.

if the plaintiff proceed to trial and fail, he is not entitled to the
up to the time of the defendant's paying money into court.
v. Yorke & D & E. 10; and *Katell v. Hulson*, *ib.* 11. Nor if he pro-
rial, and a juror is withdrawn, *Stodart v. Johnson*, 3 D. & E. 657.

Not,

1739, 40.

H. 13 G. 2.
Wednesday
Feb 6th.

GODOLPHIN EDWARDS and JOHN SPICER
ACTON MOSELEY and THOMAS STANLEY

A lord may "TRESPASS for taking and carrying away a cabinet. It came on before my Brother Fortescue at the Salop assizes. Verdict for the plaintiff to the opinion of the Judge on this case.

—But if a heriot be reserved by deed since the Stat. quia emptores, payable by tenant in fee, it will be considered as rent, and then the landlord cannot seize, but must either distrain or bring an action for nonpayment.

In trespass the defendants justified taking and carrying away the boat and cabinet for two heriots, which they became due to the defendant Moseley, as lord of the manor of Bildwas on the death of Samuel Edwards, who was seised of lands in the manor called West Coppice and West

In order to make out this right the defendants produced in evidence the counterpart of a feoffment, dated August 22 Eliz., between Edward Gray of Bildwas county of Salop of the one part and Launcelot Lacon of the other part; whereby the said Edward, under whom the defendant Moseley claims, gave the premises to the said Launcelot, under whom the said Samuel Edwards claimed, and his heirs at and unto them and their heirs forever, to have and to hold unto them and their heirs forever, yearly rent of 10l.; and in the said feoffment is the following reservation, viz. and paying two heriots at the death of him the said Lancelot, and the decease or deceases of any of his heirs or assigns of the premises." It likewise appeared in evidence that the defendants seised the said boat and cabinet, which belonged to the said Samuel Edwards, for the two heriots reserved by the said deed.

The question was whether on this title the defendant Moseley had a right to seize the goods as heriots.

The rule at the assizes was so drawn up that if the defendant should be of opinion with the plaintiffs, then the defendant

Nor, if he enter into a consolidation rule in actions on a policy of insurance and become nonsuit in one, is he entitled to the costs up to the time he brings money into court in the other actions that were not tried. See *Harmer*, 7 D. & E. 372; and *Sykes v. Wilson*, E. 39 G. 3. B. R.

return the goods and pay the plaintiffs their costs, 1739, 40, he Judge should be of opinion with the defendants, ^{EDWARDS} ~~they~~ ^{against} ~~should~~ ^{MOSELEY.} retain the goods and the plaintiffs should pay the costs.

the case had been spoken to before the Judge (a); and he was clearly of opinion with the plaintiffs, yet importunity of the counsel he was prevailed on to come before the Court: but he said that he left it to the jury whether the defendants took the goods by way of heriots, or seized them as heriots; and they found that they seized them as heriots.

the case coming this day before the Court,

our Serjt. for the defendants insisted, 1st, that this action was certain enough; and 2dly, that the defendants had a right to seize the goods as heriots.

he insisted, as to the first, that "heriot" vi termini did not signify the best beast; for which purpose he cited *Lambert de priscis Anglorum legibus* fo. 423. *Spelman's* 187, 8; *Co. Copyholder*, p. 25; and the preface to the title written by *Fortescue* J. of absolute and limited tenure. And he insisted that heriots were not services, part of the feudal tenure. He said that for heriot a man may either seize or distrain; and that the law has long since been holden to be law in respect to service (b), though this was formerly doubted (c). He insisted that this was heriot service; and that though it usually means the best beast, it is otherwise in all manors, and must be determined by the custom of the manor.

was argued before him by Mr. *Hollings* and Mr. *Taylor* for the plaintiffs, and by *Skinner* King's Serjt. *Hayward* Serjt. and Mr. *Wilbraham* for the defendants.

at the time of *Edward* the Third. See *M. 6. Ed. 3. 36. pl. 3*; *Fitz. Heriot*, pl. 2; *Bro. Abr. "Heriot"* 2; *Plowd.* 96; *Odiham v. Bro. Elm.* 589; *Moor* 540, in *B. R.* reversing the judgment in *B. C.*; *Parker v. Gage* 1 *Show.* 81, and *Holt's Rep.* 337; *Major v. Sed. Cro. Car.* 260; *Osborne, v. Sturt*, 2 *Lutw.* 1367; and *Austin v. Salk.* 356. *de Kailow.* 62; *Bondl.* 30. pl. 47; and *Doct. & Stud. Dial.* 2. c. 9 fo.

1739, 40. *Bootle* Serjt. for the plaintiffs insisted that a heriot properly signifies the best beast, but admitted that by a particular custom there may be a heriot of the best good. And he cited *Hob.* 176; *Hutton* 4. He admitted that this were a good reservation, the lord of the manor might seize the things in question for heriots, but insisted that this reservation was uncertain and void, as "heriot" is a word of no certain signification.

EDWARDS
against
MOSELEY.

I was clearly of opinion for the plaintiffs as to both points though *Bootle* Serjt. for the plaintiffs gave up one of them.

1st, I admitted it to be good law that a man may seize as well as distrain for heriot service. But I was of opinion that these could not be considered as heriots, because heriots are services and part of the tenure; and since the statute of quia emptores terrarum no tenures can be created or heriots reserved. It must be considered therefore only in the present case as the reservation of a rent or agreement to pay a certain thing; and consequently if rent, it must be certain what that rent is, and there must be the same certainty if it be considered as an agreement to pay or deliver any thing. Now the word "heriot" has no certain signification: but the meaning of it must always be determined by the custom (a) of the manor, which can have no operation in the present case. If it has no certain signification, it means (as has been insisted) the best animal; and if so, for that reason likewise, this seizure of dead goods cannot be justified.

2dly, I was of opinion likewise that the defendants could not seize the things in question, even though the reservation had been certain enough. 1. If it be considered as a rent, no one can seize a thing reserved as rent, but must either distrain for it or bring an action. 2. If it be considered as an agreement to pay or deliver any thing, no one can seize upon such agreement, but must bring his action upon the agreement if it be not performed.

Mr. J. *Fortescue Aland* was of the same opinion. And he said that "heriot" was originally derived from "here," which in *Saxon* signifies an army, and "geat" which

(a) Vid. *Parkin* vs *Radcliffe*, *Bos. & Pull.* 282.

signific

signifies provision (a); and that the reservation was originally of something proper for an army. And he excluded the notion that *beriot* was derived from *beir*.

EDWARDS
against
MOSELEY.

Mr. J. *Wm. Fortescue* was of the same opinion; adding that he was always of this opinion both at the trial and when the case was spoken to before him.

After we had delivered our opinions, *Hayward* Serjt. for the defendants insisted much to have it spoken to again; but, thinking it to be a very clear case, we would not permit it.

So we gave judgment for the plaintiffs according to the rule."

(a) Contrary to Lord *Coke's* definition, *Co. Lit.* 185. b., that "here" signifies *ed lord* and "great" *best*; i. e. the *lord's best*.

JOHN DENNETT *against* JOHN GROVER, JOHN STEEL, and JOHN EDWARDS.

H. 13 Geo.
2. Wednes-
day, Feb. 6th.

TRESPASS, for that the defendants on the 30th of *January* 1738 broke and entered the house of the plaintiff at *Steyning* in *Sussex*, and continued there ten days without the license and against the will of the plaintiff, and for the whole time greatly disturbed the plaintiff in the peaceable possession of the said house, and seized took kept and detained and converted to their own use and sold and disposed of divers goods and chattels particularly specified in the declaration to the value of 100*l.*; damage 15*l.*

The defendant's pleaded not guilty as to all the trespasss, except breaking and entering the said house and continuing there for the space of ten days and disturbing the plaintiff in the possession thereof for the said ten days; and thereupon issue is joined.

And as to breaking and entering the said house, &c, they pleaded that before the said time when, &c *viz.* 21st *January* 1738 the plaintiff licensed the said *John Steel* to enter the said house and to continue therein for the

If A license B. to enter his house to sell goods, B. may take assistants if necessary for the purpose of selling the goods. And if it be pleaded that B. and also C. and D. his servants, and by his command entered for that purpose, and necessarily continued there so long, it will be understood that it was necessary for them all to enter.

sale

1739. 40. sale of divers goods and chattels of the said *John Steel* in the said house ; by virtue of which said license he the said *John Steel* in his own right and the said *John Grover* and *John Edwards* as his servants and by his command afterwards, viz. at the said time when &c peaceably entered the said house in which &c by and through the door thereof (then being open) to sell the said goods and chattels of the said *John Steel*, and in and about the sale they the said *John Grover John Steel* and *John Edwards* necessarily continued in the said house in which &c. for the space of ten days then next following, and in so doing they the said *John Grover John Steel* and *John Edwards* did necessarily give as little disturbance to the said *John Dennett* on that occasion as they could, which are the breaking and entering &c ; and this they are ready to verify ; wherefore they pray judgment &c.

DENNETT
against
GROVER.

The plaintiff demurred generally, and the defendants joined in demurrer.

Agar Serjt. for the plaintiff took two objections to the plea ; 1st, In substance, that it being jointly pleaded by all the defendants, if not good as to any of them, it was bad as to all (*a*) (quod conceditur ;) and that the license, being only to *John Steel*, would not justify his taking the other two defendants along with him into the house ; 2dly, That it was bad in point of form, for that the plea ought to have concluded to the country.

First ; To support the first objection he cited *Bro. Abr. tit. "License,"* pl. 10 ; and the case of *Wickham and Walker*, adjudged in this court, where it was ruled that a person qualified to kill game could not take others with him who were not qualified. And he insisted very strongly that the license was personal to *John Steel* ; and that therefore it could not justify the entry of any one else, at least that it ought to have appeared in the plea that their entry was necessary for the purposes mentioned in the license, which is not alleged in the plea.

Secondly ; He insisted that the defendants ought to have concluded to the country, and not with *hoc parati*

(*a*) Vid. *Moravia and Soper, M. 11 Geo. 2. ante 32.*

unt verificare, they having insisted on matters of fact which are properly traversable; and that this is more than matter of form, and consequently that it may be taken advantage of upon a general demurrer.

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Wynne Serjt. for the defendants. This is not a matter of pleasure (a) and therefore different from the cases cited. Where a man grants to another a matter of profit or licenses him to do any thing which may be of profit to him, every thing which is incident and necessary for the obtaining of such profit necessarily passes by such grant or license. Quando aliquid conceditur, conceditur id sine quo illud fieri non possit. For this purpose he cited *Cro. Jac.* 377; *Wingfield v. Bell*; 1 *Rol. Abr.* 399. C. pl. 3; and 1 *Ventr.* 45. And he put the case that a man should license another to remove a stone of several hundred pounds weight off his ground, it would be ridiculous to say that he could bring no one else on the ground to help him, but that he must do it himself.

As to the second objection, he insisted that if it were wrong, yet being mere matter of form, it ought to have been particularly assigned as a cause of demurrer, and could not be taken advantage of on a general demurrer, but that he said it was very right, and better, and more for the advantage of the plaintiff (the plea containing several matters of fact) than if the defendants had concluded to the country.

I was clearly of opinion against the plaintiff in respect to both objections. As to the first; I agreed with *Wynne* that where a man is licensed to do a thing, it necessarily implies that he may do every thing without which that thing cannot be done; and unless a man could sell goods to himself, and be both buyer and seller, it was absurd to say that it was a license to *Steel* only to go himself into the house. Besides it is highly probable that he might want to take several persons along with him in order

(a) In *Hil.* 13 *Hen.* 7. 13. the distinction is taken between those licenses that are given for pleasure and those for profit, that the former are merely personal, but that in the other case the person to whom the license is given may take others with him; "Et issint si on me license a avoir un arbre in son bois, mes servants passeront le fier del arbre et l'entrer." The former branch of this distinction is also supported by a passage in *Finch's Law*, 16 and 17, and the latter by a case in *Hil.* 13 *Hen.* 7. 10.

1739. 40. to assist in the sale. And this is sufficiently set forth the plea ; for it is alleged that all three *necessarily* *continued* in the house ten days to sell the said goods ; if their continuance therein were necessary, their entry must certainly be so too, and is therefore sufficiently alleged. As to the case *Wickham v. Walker*, it has no semblance to this.

DEWITT
against
GROVER.

As to the second objection ; I thought it (if any) matter of form, and that therefore no advantage could be taken of it upon this general demurrer. But I was of opinion that the conclusion (a) of the plea was right, better than if it had concluded to the country, nay, I inclined to think that if it had been otherwise, it had been wrong ; for if the plea had concluded to the country, the plaintiff had joined issue upon it, it would have been a complicated issue, in which several matters very different in their nature would have been put in one issue. Now the plaintiff had his choice either to traverse any of these facts separately, or to reply *de injuriâ suâ pro absque tali causâ* ; whereby he would have put the whole plea in issue.

Fortescue, Aland, J. was of the same opinion ; and that if the defendant had concluded to the country it had been wrong.

Fortescue W. J. was of the same opinion ; and said there was a sufficient averment of the necessity, or if the license implied it ; but of this I doubted.

Per Curiam, Judgment for the defendants.

(a) This seems to come within the general rule, *Co. Lit.* 303. a. that in the affirmative ought to be averred.

1739, 40.

ART LADBROKE and WILLIAM GYLES
against JOSEPH JAMES.

H. 13 Geo. 2.
Wednesday,
Feb. 6th.

SE. The plaintiff declares on several promises or goods sold and delivered &c by them and *reles Baynton* deceased to the defendant ; damage

In pleading a judgment of a Court of limited jurisdiction, it is necessary to state those

defendant comes and defends the wrong and injury &c ; and pleads that the plaintiffs ought not to have execution of any damages against the defendant to his person, because he says that the said several actions in the said declaration mentioned accrued the 1st of *January* 1736, *to wit*, on the 1st of *January* 1735, and that he the said defendant on the 1st of *January* 1736 was actually beyond the seas in foreign parts, at *Helvoetsluys* in *Holland*, and that he the defendant afterwards, *to wit*, at a general quarter of the peace holden for the city of *Bristol* and of the same city at the Guildhall of the same and the same city by adjournment on *Wednesday* the *August* 1738 before *Nathaniel Day* the Mayor &c of the said city and county &c was duly discharged from imprisonment *aforsaid* ; and this he is ready to shew wherefore he prays judgment if the plaintiffs do have execution against his person &c.

facts that give that Court a jurisdiction ; and having stated those, the party may allege generally that that Court gave such a judgment.

The insolvent act 10 Geo. 2. c.

gave the Court of Quarter Sessions power

to discharge certain persons who had

surrendered before a certain time :

held that in pleading a discharge by

a Court of Sessions it was necessary to

allege that the party was

in prison or had surrendered himself before that

time.

--Saying that "he was duly discharged by the Court of Quarter Sessions

plaintiffs reply that they ought not to be barred from having execution against the said defendant for the same as to be recovered to charge his person, because they say that the said *Joseph* did not surrender himself to the gaoler or gaolers keeper or keepers of the King's Bench or Marshalsea or Fleet or to the prison of such county where he last dwelt for the space of six months ; and this he is ready to verify, wherefore they pray judgment

the defendant demurs generally, and the plaintiffs join issue.

alone sufficient,

sions from his imprisonment *aforsaid*" is not alone sufficient,
Draper

1739, 40. *Draper* Serjt. for the defendant insisted that the replication was not good : for he said that the Court of Sessions having discharged the defendant this Court could not inquire into the regularity of the discharge, of which they were the proper judges. And for this he cited the case of *Linwood v. Hopkins*, M. 8 Geo. 2, before Lord *Hardwicke* at Guildhall, where it being objected that proper notice was not given in the Gazette, he was of opinion that the Sessions were the proper judges of this, and that it could not be inquired into upon the trial ; and the case of *Savage v. Field (a)*, B. R. M. 9 Geo. 2, where the same thing was determined.

LADBROKE
against
JAMES.

Bellfield Serjt. for the plaintiffs admitted that, if it had appeared that the Court had jurisdiction, their judgment must be taken to be right ; and said that this was all that was determined in the case of *Savage v. Field*, and that it was held in that case that it was necessary to prove the surrender in order to shew that the Court had a jurisdiction. He insisted that it ought to have been set forth in the plea that the defendant surrendered himself in order to give the Court a jurisdiction, which it is not. Upon the former acts it was always considered necessary to set forth that the party was in prison in order to give the Court a jurisdiction ; and by the last act a surrender is made to be equal and tantamount to a legal imprisonment. Unless therefore it appear that the party was legally in prison or surrendered himself according to the 10 Geo. 2, he insisted that the Sessions had no jurisdiction. He insisted likewise that the defendant ought to have confessed the action in his plea, before he pleaded in exoneration of his person. And he said that for ought that appeared the defendant might have been committed for a criminal cause, which is not within the act.

Draper Serjt. in reply admitted that in the case of *Savage v. Field* it was held that it must be shewn that the Justices had a jurisdiction, but endeavoured to distinguish the present case, because he said that by the stat. 2 Anne the party was obliged to plead an imprisonment, but that by this act he is not obliged to plead a surrender.

(a) *Rep. temp. Hardw.* 168.

(b) See *Sellers v. Lawrence*, post. Tr. 16 & 17 Geo. 2.

But

But I was of opinion for the plaintiffs that the plea was good, and therefore had no occasion to give any opinion upon the replication.

1739, 40.

LADBROKE
against
JAMES

I admitted that if it had appeared (*a*) that the Sessions had jurisdiction, it would have been sufficient to have generally that the Sessions had discharged him, and we could not inquire into any facts necessary to be proved by him in order to obtain his discharge, of which the Sessions were the only and the proper judges, and must be taken to have adjudged right. But as in the case where imprisonment is necessary it must always be set forth that the party was in prison in order to give the judges a jurisdiction, so I was of opinion that in this case it was equally necessary for the party to set forth that he had entered himself, which by the last act is made tantamount to an imprisonment, but it is not set forth in the plea that the party surrendered himself or that he was ever in prison; for it is only said that he was discharged from his imprisonment aforesaid, whereas no imprisonment was mentioned before. And I thought that the words of the last act did not warrant the distinction made by *Draper*.

As to the objection that the defendant should have confessed the action, I did not think that there was much in it; for by not denying it and pleading only in exoneration on his person, I was of opinion that he had sufficiently met it.

Mr. J. *Fortescue* A. of the same opinion; and said that the plaintiffs might have demurred to the plea.

Mr. J. *W. Fortescue* of the same opinion.

So judgment for the plaintiffs."

¹ See *Sellers v. Lawrence*, post, Tr. 16 & 17 Geo. 2.

² See *Carterel v. Hecke*, Dougl. 97, and *Marks v. Upton*, 7 Durnf. & 35, where it is pleaded (in the first case under stat. 16 Geo. 3. c. 38., and other under stat. 34 Geo. 3. c. 69.) that the defendants were actually in prison on the respective days &c., and were duly discharged at the Sessions according to the statutes.

1740.

E. 13 G. 2 THOMAS BELL *against* GEORGE WARDELL
 Thursday, JOHN CUMMIN alias COMYNES.
 May 8th.

Justification
 (in trespass)
 under a cus-
 tom for all
 the inhabi-
 tants of a
 town to walk
 and ride over
 a close of
 arable land
 at all season-
 able times in
 the year was
 holden bad,
 because it
 appeared
 that the tres-
 pass was
 committed
 when the
 corn was
 standing,
 though the
 defendant
 averred that
 it was a sea-
 sonable time.
 —“Season-
 able time”
 partly ques-
 tion of law
 and partly of
 fact.
 —Replica-
 tion de inju-
 ria sua pro-
 pria &c bad,
 when it puts
 several dis-
 tinct points
 in issue.

THE opinion of the Court was thus given by

Willes Lord Chief Justice. “Trespass, for the defendants on the 2d of *May* 1738 and at divers times between that day and the 12th of the same month broke entered two closes of the plaintiff called *Sbieldfield* *Little Sbieldfield* at the town and county of *New* *upon-Tyne*, and with their feet trod down spoiled consumed the plaintiff’s grass and corn there growing with divers cattle trod down depastured ate up and consumed other grass and corn of the plaintiff’s there ing, and broke threw down and spoiled five perches his hedges and five perches of his fences, and wrong, &c; to the damage of 20*l*.

The defendant *Wardell* as to the force and arm all the trespasss supposed to be done with bulls cows and swine pleads not guilty; and as to the refusal the trespasss pleads specially that the places in which are two closes of pasture bounded (prout); and that said two closes time out of mind and until &c were together without any hedge or fence and were parcel of certain lands called and known by the name *Sbieldfield*, and have been repaired to and used as a place of resort for the inhabitants of the town and aforesaid, and that within the said town time out of there hath been a certain ancient custom there used approved, that the inhabitants of the said town time mind in every year at all *seasonable times* in the year had the easement liberty and privilege and have used been accustomed to have the easement liberty and privilege of walking and riding on horseback in the said close air and exercise for the benefit and preservation health of the inhabitants of the said town without molestation or disturbance whatsoever. And the defendant saith that on the said 2d day of *May* and before ever since he was and still is an inhabitant of the said wherefore he on the said 2d day of *May* and at divers

between that day and the 12th of the said month, said several times in which &c *being seasonable times*, 1740: on horseback and walked in the said closes for air exercise and for the benefit and preservation of his health; and because the said closes at the several times when &c were inclosed with the hedges and fences in the situation mentioned so that the said defendant could not enter into the said closes on horseback without breaking down the said hedges and fences the said defendant at the several days and times when &c in order to enter into the said closes on horseback necessarily broke down the said hedges and fences, and in walking and riding as aforesaid necessarily trod down and covered with his feet in walking a little grass and corn there growing, and the said horses mares and geldings on which the said defendant rode in the said closes trod down and summed and snatched and ate up a few morsels of grass and corn there growing, doing as little damage as might be expected which are the same trespasses &c; and this he is ready to verify; wherefore he prays judgment whether the plaintiff ought to have his said action against him &c.

BELL
against
WARDLE

The defendant *Comyns* pleads the same plea, *mutatis mutandis*.

The plaintiff replies to both the pleas, and assigns a new trespass in two closes of land described to have different boundaries from those set forth in the defendants' pleas.

To this new assignment both the defendants plead the same pleas as before, only they do not say that the two closes are closes of pasture, but admit them to be two closes of land as they are called in the new assignment.

The plaintiff replies to both the said pleas *de injuriâ suâ priâ absque tali causâ*, and this he prays may be entered of by the country.

To this replication both the defendants demur, and for causes of demurrer shew that the plaintiff in his replication traverses and offers to put in issue all the matters alleged in the defendants' pleas, whereas he should only traverse some single matter of fact alleged in these pleas, and for that the said replication is complicated and informal.

The

1740.

BELL
against
WARDELL.

The plaintiff joins in demurrer (a). On this demurrer it now comes before the Court for judgment.

The replication of the plaintiff to the defendants' plea pleaded to the new assignment was admitted by the court for the plaintiff not to be good ; and to be sure it cannot be supported for the reasons mentioned in the demurrer, it putting several different matters in issue ; whereas the chief end and use of special pleading is to reduce matters to a single point. And therefore such a replication was held to be bad in this court in the case of *Cooper Marks* (b), and in the case of *Cockerill v. Armstrong*, this court Trin. 1738 (c) ; in which last case all the cases relating to such a replication are fully stated and considered.

But it was insisted by the counsel for the plaintiff that the pleas of the defendants are bad, and that therefore it is not material whether the replication be good or not. The objection to the pleas was that the custom is not law generally at all times of the year, but only at all *seasonable times*, and that it appeared from the defendants' own shewing that the riding which they insisted on as a justification was not at a seasonable time ; and that of this the court were the proper judges, as in the case of a *reasonable time, reasonable fines, customs and services*, of which the Court are the proper judges (d). For what is contrary to reason cannot be consonant to law, which is founded on reason ; and therefore the reasonableness in these and the like cases depends on the law and is to be decided by the Judges, as is held in *Co. Lit.* 56, b. ; 99, b. ; 4 *Co.* 27. b. the case of *Hobart v. Hammond*, *Cr. Jac.* 204, the case of *Stodden v. Harvey*, *Cr. Eliz.* 58, the case of *Makarell v. Bachelor* ; where the Court on a demurrer took upon them to determine what was proper and necessary apparel for the defendant who was an infant and gentleman of the chamber to the Earl of *Essex*. These cases were not controverted : but it was said that it was

(a) This case was twice argued, the first time 14th Nov. 1738, and the second time on the 6th of May 1740 by *Hoste* Serjt. for the plaintiff and *Agar* Serjt. for the defendants.

(b) *Supra*, 52.

(c) *Supra*, 99. See the cases there referred to.

(d) See *Baton v. Southby*, *supra*, 135. *Hil.* 12 Geo. 2. and the cases there referred to.

here

ted to be a seasonable time, which was admitted
 murrer, or at least that an issue ought to have
 ed that it might appear on the evidence at the
 ther it was a seasonable time or not; for it was
 by "seasonable times" was meant in good wea-
 n it did not rain snow or hail, and when it would
 able to ride out for the preservation of health,
 tom is laid to be. But to be sure the word "sea-
 will admit here of no such construction; for it is
 to say that "unseasonable" was meant in re-
 he person claiming the right; for if he has a ge-
 it, he is not bound to ride out but just when he
 But "unseasonable" must necessarily mean in
 o the owner of the soil; otherwise the custom
 a very strange one, that all the inhabitants of the
Newcastle might ride over the plaintiff's corn and
 ill times of the year whenever they pleased,
 ould be to say that the inhabitants of *Newcastle*
 it to take away from the plaintiff all the profits
 land.

1740.
 BELL
 against
 WARDELL.

is indeed a case in 1 *Lev.* 176, 177. *Abbot v.*
17 Car. 2. B. R., wherein a custom (a) that
 abitants of a town had a right to dance at all
 ne year for their recreation (b) in the plaintiff's
 close

o. 176. where it is stated as a *prescription*: and see note (b) *infra*.
ump v. Johnson and others: 12th of February 1746, B. C. Trei-
 ng and entering the plaintiff's close at *Colehill* and treading down
 ; the grass there growing. The defendants pleaded a custom
 habitants of the town of *Colehill* for the time being to have and
 y and privilege of playing at any rural sports or games in the
 1 year at all times of the year at their will and pleasure; and then
 ibitants "playing at rural sports and games therein &c." This
 verded in the replication. And after a verdict, establishing the
 ion was made to enter up judgment for the plaintiff notwith-
 dict found for the defendants on the ground that the custom
 ported in law, 1st, Because it was too general and uncertain, in
 what rural sport or game; 2dly, Because it was illegal and un-
 being confined to *reasonable or legal times* of the year; and 3dly,
 ould have been no consideration for it, and it could not have had
 cement.

argued by *Skinner King's Serjt.* and *Leeds Serjt.* for the plain-
 as *King's Serjt.* and *Wynne Serjt.* for the defendants; and at a
 he rule was made absolute to enter up judgment for the plain-
 ount being of opinion that the custom as laid extending to any
 rural

v. Newill, 1 D. & E. 118; and *Selby v. Robinson*, 2 D. &

1740. close was holden to be a good custom : but it was a verdict which found the custom ; it was only in a close pasture, for dancing, and not riding, and the court that perhaps it might not be good upon a demurrer. And I own that if a general custom had been laid present case, considering that this is on a demurrer for riding and in arable land, I should have much doubt whether this were a good custom or not. But the being the case, I need not give any positive opinion upon it.

BELL
against
WARDELL.

But as the custom is laid here, if it were not a seasonable time the justification is not within the custom. The Court are the proper judges of this, yet in many cases where it does not sufficiently appear upon the facts whether it were a seasonable time or not ; accordingly it is said in the before-mentioned case of *Hammond* that the reasonableness of fines must be determined by the Judges either on a demurrer or upon evidence laid before a Jury. For issues may be joined on things which are partly matters of fact and partly matters of law ; and then when the evidence is given at the trial the Judge must direct the Jury how the law is, and if they find contrary to such direction it is a sufficient ground for a new trial.

rural sports was too general and uncertain. But they thought that there was weight in the second or third objections ; for that " all times of the year " be taken to mean " legal and reasonable times of the year," and that it not take away the profits of the land ; and that it might have had a legal commencement MS. *Willes* Lord Chief Justice.

In a late case however, *Fitch v. Rawling and others*, 2 H. Bl. Rep. 393, a custom for all the inhabitants of the parish of *Steeple Bumpstead* to play at all kinds of lawful games sports and pastimes in the parish at all reasonable times of the year at their will and pleasure was holden to be a good custom, though a similar custom " for all persons for the time being in the said parish &c " was decided to be bad.

(a) But this part of the opinion of the Court was given (not in answer to the principal objection, which was that the prescription was bad, but) in answer to the second objection that the right or easement should have been claimed by custom not prescription ; though indeed it appears extraordinary that the court should have removed either of the objections — As to the second objection in that case ; see *Gatesward's* case, 6 Co. 59. b. *Grimstead v. Marlow*, 1 E. 717 ; and *Hardy v. Hollyday*, 5 G. 3. C. B. there cited 718 ; the distinction is taken between an interest, a profit a prendre in alienable right of pasture &c, and an easement, as a right of way ; that for the first party must prescribe in a free estate, (except in the case of copyholden their lord) but that the latter may be claimed by custom.

For the present case there is sufficient matter set
 the pleadings for the Court to determine that it
 a seasonable time; and therefore an issue would
 the parties to an unnecessary expence. For the
 is admitted to be done upon arable land between
 and twelfth of *May*, when corn was growing
 and; and the averment that it was at a *seasonable*
 not alter the case, since such averment is incon-
 sistent with the whole tenor of their plea, and the de-
 fendant will not help the plea if inconsistent with itself.
 For example, that the defendants had insisted
 that it was of common every year from the time that the
 corn was cut and carried off until it is sown again, and then
 it is the custom had justified putting their cattle on the
 close and eating up his corn there growing,
 that the corn was all carried off before their cat-
 tle was put in: such a plea would be plainly absurd and
 inconsistent, and yet that is exactly a parallel case to the

1740.

BELL
 against
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It was said that in the present case the corn might
 be cut at an unseasonable time to prevent the defend-
 ing there according to the custom; but the times
 when the trespass is here admitted to have been done,
 between the 2d and 12th of *May*, shew this to be
 false: but if it had been so, the defendants in such
 a case might have insisted on it in their pleas.

On these reasons we are all clearly of opinion that
 it must be for the plaintiff (a)."

Selly v. Robinson, 2 D. & E. 758, where it was holden that a cus-
 tom of poor necessitous and indigent householders residing within the town-
 and suburbs to cut and carry away rotten boughs and branches in a close was
 a custom of the uncertain description of persons in respect of whom the
 custom was claimed.—See also *Fitch v. Rawling*, 2 H. Bl. Rep. C. B. 393. *sup.*

1740.

T. 13 & 14

G. 2.

Thursday,
June 19th.

One tenant in common cannot maintain an action of account at common law against another as his bailiff, unless that other were appointed bailiff; but under the stat. 4 & 5 An. c. 16. he may.—In such action on the statute the plaintiff must state in his declaration that he and the defendant are tenants in common, and that the defendant has received more than his share &c. 14 Vin. Abr. 513. 514. S. C.

WHEELER *against* HORNE.

THIS was an action of account.

The declaration stated that the *defendant was bailiff of the plaintiff* of one twelfth part (the whole in twelve parts to be divided) of certain premises therein described in the parish of *Simonward* in *Cornwall* from the 1st of *April* 1720 to the 1st of *October* 1734, and received the annual profits thereof for all that time, to render a reasonable account thereof to the plaintiff when he should be requested, yet that, though often requested, he had not rendered a reasonable account to the plaintiff, but refused &c; to the plaintiff's damage 20l. &c.

The defendant pleaded that he never was bailiff or receiver of the plaintiff for the premises mentioned in the declaration, to render an account thereof to the plaintiff in manner and form as the plaintiff above declared &c; on which issue was joined.

On the trial of the cause in the county of *Cornwall* it was proved that the plaintiff and defendant were tenants in common of the premises, the plaintiff of one twelfth part, and the defendant of the other eleventh parts, for the time mentioned in the declaration. That the defendant had been in the possession of and lived upon the premises, and took to his own use during all that time all the issues and profits of the whole twelve parts, about 8l. a year, and refused to account with or to pay the plaintiff her share. But the plaintiff did not prove that she had ever appointed the defendant her bailiff of her twelfth part. The jury found a verdict for the plaintiff, subject to the opinion of

Mr. J. *W. Fortescue*; and the question agreed to be reserved was whether, on the above facts so proved, the declaration were sufficient to maintain the action against the defendant as bailiff to the plaintiff of her twelfth part.

The case was argued in *Mich. 13 Geo. 2.* before Mr. J. *W. Fortescue*, who determined in favour of the defendant;

; and then the case was referred to the consideration of the Court of Common pleas. It was argued on the 1st of June 1740 by *Hussey* Serjt. for the plaintiff, and *Wheeler* Serjt. for the defendant; and on a subsequent *Horne*. 1740.

Villes Chief Justice delivered the opinion of the Court (after stating the case) as follows.

‘ An action of account would not lie by one tenant in common against another as his bailiff at common law, unless he were so particularly appointed. It was so expressly said in *Co. Lit.* 172. a.; and there is no case to the contrary. One indeed was cited from *Bro. Abr. account*,” pl. 20. 47 E. 3. to shew that if two were jointly possessed of a horse, and one of them sell him, an action of account will lie against him for the share of the money. But that is quite a different case from the present, which is for the receipt of the rents and profits of a lease; 1st, because that was the case of a *personal* debt; and 2dly, because there by the sale and turning of the thing into money the joint interest was gone, and each had a separate interest for a sum certain: and I should think that not only an action of account, but even an action on the case for money had and received, might be brought against him for it. So that I think it is clear that this action would not lie at common law, but must be maintained, if at all, on the statute 4 & 5 Anne, c. 16.

The words of that act (a) are that from and after &c. actions of account may be brought and maintained by the joint-tenant or tenant in common against the other or his bailiff *for receiving more than comes to his just share or proportion*; and the auditors appointed by the Court, where such action shall be depending, are to administer an oath, and to examine the parties touching the matters in question &c.

Though an action of account therefore may be brought by one tenant in common against another since this statute, yet it is an action of a very different nature from an action of account against a bailiff at common law;

(a) Sect. 17.

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First, Because a bailiff at common law is answerable not only for his actual receipts but for what he might have made of the lands without his wilful default, as expressly held in *Co. Lit.* 172. a., and in many other books: but by the plain words of the statute a tenant in common, when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion.

Secondly, Because the auditors in an action of account at common law could not administer an oath unless in one or two particular cases: but by the statute the auditors may examine the parties on oath. Now as the judgment in both actions must be in general quod computet, how can the auditors tell in what manner he is to account, whether they are to examine on oath or not, unless it appear by the record in what capacity he is sued and what sort of action this is? It was said that such a suggestion might be made on the record: but I believe no such suggestion was ever heard of. But the declarations since the statute have always set forth that the plaintiff and defendant are tenants in common, and that the defendant has received more than his share. To be sure, as this is a general statute, it was not necessary to set it forth or refer to it: but the plaintiff should have set forth so much as to bring his case within the statute; and it is material that in the present case the defendant has pleaded that he was not bailiff to the plaintiff. The bailiff set forth in the declaration must be taken to be a bailiff by appointment, and it is admitted that the defendant was not appointed; so the defendant has made good his plea.

We are therefore of opinion that the verdict must be set aside, and that the plaintiff must pay the costs of nonsuit according to the rule."

1740.

ODDTITLE on the Demise of JOHN GURNALL Trin. 13 &
against WOOD. 14 Geo. 2.
Monday,
June 23d.

HIS came before the Court on a case reserved at the assizes at *Appleby* in *August* 1739.

Gurnall, being seised in fee of the premises in question, by will dated 30th of *March* 1722, devised to *his* wife for her life, remainder to his son *John Gurnall* and his heirs, he or his mother paying thereout to *Frances* and *Dorothy Harrison*, his wife's daughters, 40 *l.* each when they should attain their respective ages of twenty-one years; but if his son *John Gurnall* should die before he attained the age of twenty-one years, then he devised the said premises to his wife's son *William Harrison* and his heirs, he paying out of the same the further sum of 20 *l.* to his sister *Frances* at the end of the first year, and the sum of 20 *l.* to his sister *Dorothy* at the end of the second year after his entrance into the said premises. After the devisor's death, *Dorothy* the widow enjoyed the premises during her life, and she died on the 14th of *June* 1726: on her decease *John Gurnall*, the son, entered, and received the rents and profits until his death, on the 24th of *February* 1736, which was before he attained the age of twenty-one years. *W. Harrison*, devisee, died after the death of the widow and in the time of *John Gurnall*, the son, to wit, on the 1st of *April* 1733, leaving his said two sisters *Frances* and *Dorothy* his coheiresses, the elder of whom married *T. Wood* the defendant: *W. Harrison* was never in possession. *John Gurnall*, the lessor of the plaintiff, is cousin heir of *John Gurnall*, the devisee, namely, the son of *John Gurnall* who was the elder brother of *T. Gurnall*, the devisor. The defendant *Wood* has been in possession of the premises ever since the death of *John Gurnall* the devisee. The question reserved was whether the heir of *Harrison* was entitled under the said devise, or the heir of the plaintiff as heir at law to *John Gurnall* the

A devise to A. and his heirs, but if he die before twenty-one then to B. and his heirs, is a good executory devise to B.; and if B. survive the devisor, it will descend to B.'s heir, though he die before the contingency happens, ff. the death of A. before twenty-one. 7 Mod. 302. oct. edit. 8 Vin. Abr. 112. pl. 28. S. C.

1740.
 GOODTITLE
 dem. GUR-
 WALL
 against
 WOOD.

The case was argued on the 12th of June 1740 by B Serjt. for the plaintiff, and by Birch Serjt. for the defendant; and on this day the opinion of the Court delivered, as follows, by

Willes Lord Chief Justice (after stating the case " This is a plain executory devise. The question is more than this, if there be an executory devise to *A* his heirs, and *A.* survive the deviser but die before contingency happens, whether any thing can descend his heir? To shew that nothing can descend was cited case of *Brett v. Rigden*, *Plowd.* 345: but that case very different from the present; there was a devise to and his heirs, *A.* died before the testator, and it was held that the heirs (*a*) could take nothing; and for this reason, because, if they took, they must have taken by way of limitation, which they could not do unless there were something in the ancestor at the time of his death and there was not because he died before the devise. But in the present case *W. Harrison* survived the deviser

The plaintiff's counsel then compared the case of an executory devise to a bare possibility, and insisted that a bare possibility before the contingency happened would not descend and could not be granted or devised, and a recovery would not bar it; for which purpose they cited *Fulwood's* case, 4 Co. 66. b.; *Marsh's Rep.* 136, *Pells v. Brown* in *Cro. Jac.* 590, and in several other books. But these were cases before the notion of an executory devise came in, or at least before they were established and understood. Besides, even as to possibilities, the contrary has been since holden in several cases particularly in *Goring v. Bickerstaff*, *Pollexf.* 32, *Veizy v. Pinwell*, *ib.* 44; where it was held that a

(a) *Elliott v. Davenport*, 1. P. Wms. 84; *Goodright v. Wright*, 1. So. Busby v. *Greenplate*, *ib.* 445; *Ambrose v. Hodgson*, *Dougl.* 337; *Dr Radclyffe v. Bagshaw*, 6 D. & E. 517; S. P.—Nor is there any difference in this respect between a devise to the heir at law or the deviser and heirs or the heirs of his body, and a devise to a stranger and to his heirs. *Hutton v. Simpson*, 2 Vern. 722, reported in *Gilb. Rep. in Equ.* 115, and in *Proc. in Chanc.* 439, by the name of *Symson v. Hurnsby*; and *v. Warner* lessee of *White*, B. R. Mich. 22 G. 3. in error from *Ireland* in 6 D. & R. 518.—Nor is it material that the deviser confirmed his will by codicil made after the death of the first devisee, and after he knew of his death; *See d. Turner v. Kett*, 4 D. & E. 601.

may be granted or devised (*a*); the same has 1740.
 been held in many other books.

GOODTITLE
 dem. GUR-
 NALL
 against
 WOOD.

if it were otherwise in the case of bare possibilities of late years the doctrine of executory devises has settled. They have not been considered as bare possibilities, but as certain interests and estates, and have resembled to contingent remainders in all other respects, only they have been put under some restraints to perpetuities; as, first, it was held that the contingency must happen within the compass of a life or in being, or a reasonable number of years; at length it was extended a little further, namely, to a child (*b*) in being at the time of the father's death, because, at contingency must necessarily happen within less than nine months after the death of a person in being, such a construction would introduce no inconvenience; and the rule has in many instances been extended to twenty-years after the death of a person in being, as in that case likewise there is no danger of a perpetuity. But in other respects executory devises have been always assimilated to contingent remainders; and the reason, on which they were first instituted, plainly shews that they were so to be. For the reason of their institution was this, that it was plain that the devisor intended a contingent remainder, but it could not operate as such by the rules of law, in favour of wills, and that the intent of testators (who are supposed to be inopes concilii) might take place, that sort of estates were holden to be good as executory devises, because intended to be contingent remainders. They ought therefore to take place as such as far as is consistent with the rules of law. And if this were a contingent remainder there is no doubt but that it would be good.

That in these sorts of executory estates a contingent interest may vest before the contingency happens, so as to bind the heirs or representatives of a person dying before

¹) See *Selwyn v Selwyn*, 2 Burr 1131, and 2 Bl. Rep. 251; *Goodright v Farmer v. Searle*, 2 Will. 29; *Moor v. Hawkins* in Chancery 1765, coram Lord North, cited in 1 H. Bl. Rep. 34; *See. d. Noden v. Griffiths*, 1 Rep. 605; and *Jones and Others v. Roe*, *Issue of Perry*, B. R. in error; 1. & E. 88. affirming the judgment in C. B. 1 H. Bl. Rep. 30.

²) See *Leng v. Blackall*, 7 D. & E. 100.

such

1740. such contingency happens, was fully established in case of *King v. Withers* (a), which was determined by Lord *Talbot* in July 1735; and his decree was afterwards affirmed in the House of Lords. The case was this: *dem. GUR-* gave by his will to his daughter *B.* at her age of twenty-one or marriage 2500*l.*, and if his son *C.* died without issue male of his body that his daughter should at the age of twenty-one years or day of marriage, which first happen, have and receive 3500*l.* over and above 2500*l.*: the daughter lived to be married and at twenty-one, but died before her brother and consequently before the contingency happened; afterwards her brother died without issue male, and Dr. *King*, who had married the daughter, as her administrator and representative brought his bill for the additional sum of 1000*l.* and had a decree for it; and as this sum was charged on the lands many cases were cited to shew that a contingency might be so as to be descendible or transmissible before the contingency happened. But as this is plainly agreeable to the law, and as Lord *Talbot* and the House of Lords were clearly of this opinion and made it the foundation of their judgments, it would be but mispending time to mention all the cases that were cited. With regard to the case of *Marks v. Marks*, reported in *Prec. in Chancery* determined by Lord Chancellor *Macclesfield* with the assistance of the Master of the Rolls and which was cited in the arguments, though it is a very good authority as it was determined on a principle not applicable to the present case, there is no occasion to pray it in aid of the present case.

But this doctrine being established, it is plain that the heir of *W. Harrison* is entitled in the present case, consequently that the defendant must have the possession.

(a) *Cas. temp. Talb.* 117; 3 *P. Wms.* 414; 2 *Eq. Cas. Abr.* 656. 1
4 *Bro. Parl. Cas.* 228.

1740.

DALLING *against* MATCHETT.M. 14 G. 2.
Monday,
Oct. 27th.

INNER Serjt. and *Prime* Serjt. shewed cause against a rule for setting aside an award. The award was made pursuant to a rule of nisi prius, entered the last *Lent* assizes holden for the county of *Norwich* which was afterwards made a rule of this court.

When a cause is referred to three persons, and if they or any two of them are empowered to make an award, an award made by two of them is good if the third had notice of the meetings, &c. — But if he had no such notice, then such an award is bad. Barnes 57. S. C. 4to. edit.

award was to be made on or before the first day of *May* term; and the reference was to Mr. *Britiff*, Mr. *Wise*, and Mr. *Workhouse*, of all matters in difference between the parties, so as they or any two of them should make their award by the said time. Mr. *Britiff* and Mr. *Wise* made their award in writing and duly signed and delivered it on the 31st day of *May*; and *Trinity* term of this year began on the 6th of *June*. Mr. *Workhouse* was in *London* from the time of the rule until after the award made, and never attended at any of the meetings which were holden at *Norwich*.

objections to the award were,
A defect of authority in the two arbitrators, as Mr. *Workhouse* was not present at any of the meetings, and he agreed to take upon him the burden of the re-

That the award was obtained by undue means,
That it was void by the stat. 9 & 10 W. 3. c. 15.
That it was an unjust award on the merits.

The action was an action on the case for tolls for passing through the plaintiff's locks to the defendant's. The arbitrators awarded that the defendant should pay the plaintiff 124*l.* 10*s.* in full satisfaction of all claims in difference between them, and that they should give mutual releases to each other. Several affidavits were read on both sides.

was insisted by *Belfield* Serjt. and *Umlin* Serjt. for the plaintiff,

That, though they admitted that the award might have been made and signed by two of the arbitrators

1740. *DALLING*
against
MATCH-
ETT.

tors only if the third attended and were present at the meetings, according to the case of *Sallows v. Girling*, Cro. Jac. 277., which was cited for the plaintiff and agreed to be law, yet that in the present case the absence of Mr. *Workhouse* who never attended at any of the meetings, and who had sworn that he had no notice of them, made the award bad, or at least that it was sufficient evidence of partiality in the arbitrators to proceed without him, especially when they had notice from the defendant (as was proved by an affidavit) not to proceed; that therefore for this reason the award ought to be set aside, even though they had had an authority to make it.

2dly, As evidence of partiality, they insisted on several matters which were set forth in the defendant's affidavits, but which were fully answered by the affidavits for the plaintiff; so the Court had no regard to this objection.

3dly, They insisted that the award was unjust, because it had awarded mutual releases, and yet had no regard to a demand of the defendant, which he swore by his affidavit that he had against the plaintiff. The demand sworn to was that during the twelve years that he had been miller he had suffered 300*l.* damage by the diversion of the water, and by reason that the plaintiff's locks were not kept in such good repair as they ought, but did not pretend that he had ever brought his action against the plaintiff or made any demand before this reference for such damage. And it was fully proved by the plaintiff's affidavits that on the 23d of *May*, when the first meeting of the referees was holden, the defendant's attorney desired time to produce witnesses to prove these damages, and had time given to him till the 30th of *May* to produce such witnesses, but that he did not appear at the meeting or produce any witnesses, and this by the defendant's express order. For these reasons, and because the Court on motions of this sort never enters into the merits of the award, unless it appear to be unjust upon the face of it, the Court likewise had no regard to this objection.

And as to the first objection, which was of the greatest weight, and which deserved some consideration, *The Court*

a certain number of persons in a corporation, or a major part of them, if the whole number (except one) agree, yet the act is not good, if that person was not duly summoned and had no legal notice of the meeting (a). For though it has been often said if that person had been present, he could not by his vote have carried the majority the other way, when all the rest were in favor, it has always received this answer that every man has a right to argue and debate as well as to give his vote, and it is possible at least that the person absent may, had he been present at the meeting, have made use of arguments as may have brought over a majority of the members to be of his opinion. The same reason holds in the case of arbitrators, and therefore there ought to be the same rule.

The question therefore in the present case is only a question of fact; if Mr. *Workhouse* had not due notice of the meetings of the other arbitrators, their award is void and not good: but if either by obstinacy, or at the instigation of the defendant, or being hindered by business, he withheld himself from such meetings, having had due notice hereof, we are of opinion that the award is good. Upon the affidavits we were clearly of opinion that Mr. *Workhouse* had due notice, though in his own affidavit he has attempted to swear the contrary. Otherwise it would be in the power of one of the parties to trick the other, and to defeat him of the benefit of the reference; though he allowed the other to name two of the arbitrators, yet by naming a third who (he was sure) would

1740. appeared by the affidavits that this offer, if ever made, was not till after the several meetings, and not till after the award was made (if not actually signed,) and that the defendant wrote a letter on the 28th of *May* to his attorney to another purpose, commanding him not to attend at all, plainly to defeat the plaintiff of the benefit of this reference; we had therefore no regard to this offer. But it appearing to us that the complaint against the award was extremely frivolous and vexatious, we discharged the rule with costs."

DALLING
against
MATCHETT

It appears that on the next day, *Tuesday, October 28th*, another motion was made in this cause; as follows;

The Court will not grant an attachment for non payment of a sum of money awarded and which was demanded when a rule for setting aside the award was pending.

"*Prime Serjt* moved for an attachment against *Matchett* for not paying the 124 *l.* 10. to *Dalling* in pursuance of the said award, on an affidavit of a demand and refusal in *July* last: but

We thought that the plaintiff should not have made a demand of the money when there was a rule nisi depending for setting aside the award; therefore we directed the plaintiff to demand it again, and if the defendant refused payment then to move again for an attachment."

M. 14 C. 2.
Monday,
Nov. 10th.

JAMES LAMBERT *against* THOMAS STROOTHER.

To a plea of liberum tenementum the plaintiff may reply that the place in question is the soil and freehold of the plaintiff and not the soil and freehold of the defendant — When the plaintiff names the close in his declaration in trespass, whether the defendant can plead liberum tenementum? *Qc.*

THE opinion of the Court was delivered as follows by

Willes, Lord Chief Justice. "Trespass, for that the defendant on the 1st day of *March* 7 *Geo.* 2. and at divers times between that and the 1st day of *December* 12 *Geo.* 2. broke and entered six closes of the plaintiff's called *The Fold, The Woodgard, The Croft, The Garden, The New Land, and The Chappel Green*, at *Horsforth*; and trod down and consumed the grass and corn there growing with his feet, and trod down and consumed his grass and corn with his cattle, and subverted and spoiled his soil with the wheels of carts and carriages, and broke threw down and spoiled his hedges fences and walls, and took and carried away ten loads of his stones, &c. Damages 20 *l.*

The

... to verify &c.

That the said close called *Chappel Green* at the times when &c was the soil and freehold of the , Sir *Walter Cawerley*, Bart. and six others (the names in his plea,) and so justifies in his own as their servant and by their command; and ready to verify &c.

That the said close called *The Chappel Green* at several times when &c was and is parcel of the highway leading from *Addle* to *Calverley*, and so he several other trespasses, and the breaking the hedges fences and walls, because the same was a nuisance &c; and this he is ready to verify &c.

In his first plea the plaintiff replies that the close called *Chappel Green* at the several times when &c was the soil and freehold of the plaintiff and not the soil and freehold of the defendant, as the said defendant hath alleged, and this he prays may be inquired of by the jury and the said *Thomas* likewise.

In his second plea he replies exactly in the same words, *mutandis*, and on this he tenders an issue, but no more.

In his third plea he replies that the said close called

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against
 STROOTHKE.

The defendant demurs to the second replication, and shews for cause that the replication is a negative pregnant and contains argumentative and double matter which is not issuable, &c. On the third replication he tenders an issue to the plaintiff; and the plaintiff in his surrejoinder joins issue thereupon, and joins in the demurrer to the second replication.

This case comes before the Court only on the demurrer of the defendant to the replication of the plaintiff to the second plea; for though it was said in the argument of the case that the two issues had been tried and something was said how costs would go according to the statute 4 & 5 Anne, c. 16, that matter is not now before the Court, but it comes on singly on the demurrer.

The objection to the replication as stated in the demurrer, that it is a negative pregnant and contains argumentative and double matter which is not issuable, is scarcely intelligible; for how can it be a negative pregnant, how it contains argumentative matter, I own I do not understand. But the only sensible objection to it is that it is double and puts two matters in issue, which ought not to be done; for the end of special pleading is to reduce matters to a single point.

It might be doubted whether assigning this as a cause of demurrer in this general manner be sufficient according to 1 Salk. 219, and 1 Lutw. 4., where it was holden that it is not sufficient to say placitum duplex est or dupliciter continet materiam. But in order to come at the merits I will admit that the cause of demurrer is sufficiently set forth.

To shew that such pleas and replications, which contain double matter are not good, several cases were cited; but I shall take no notice of them, because the law is undoubtedly so; but the question is upon the fact, whether this replication be double and puts two matters in issue or not.

(*) It appears that this case was argued on the 7th of February 1739, 1740 and on the 5th of May 1740 by Draper Serjt. for the defendant and by Serjt. for the plaintiff.

Upon

Upon this head a great many cases were cited, and
 when my brother *Draper* said appeared to him at first to be
 so very intricate and inconsistent that he was a great
 deal before he could find out the meaning of them, or
 reconcile them one with another, but that at last with
 some difficulty he had found out a distinction which re-
 solved them all. And I must own that I do not under-
 stand them yet, and am not able to reconcile them, and
 therefore I shall lay most of them aside, because I think
 it will determine this point with the assistance of but very
 few of them. If indeed there were any case in point, I
 should think myself obliged to take notice of it, but I
 do not find any such case.

1740.

LAMBERT
against
STROUTHER.

As for the cases in replevin in *Owen* 51, *Gouldsb.* 65,
Bulstr. 48, they are no authorities in the present
 case because trespass and replevin are in their nature as
 different actions as possible, as the right must necessarily
 be in question in replevin if the defendant thinks proper
 to deny, and the plaintiff in his plea in bar must not only
 deny his right, but likewise traverse the right of the
 defendant. Whereas trespass is a possessory action, found-
 ed merely on the possession, and it is not at all necessary
 that the right should come in question.

In the only cases that I can find in trespass that look like
 the present case are those of *Rickman v. Coxe*, *Cro. Jac.*
Witbam v. Barker, *Yelv.* 147, and *Hustler v. Raines*,
12 W. 1399, 1400 &c. As to the case in *Cro.*, it does
 not appear that any judgment was given. The case in
Cro. is different from this, because the plaintiff there did
 not traverse the freehold but the command; and the ob-
 jection was not that the replication was double, but that
 the plaintiff had not set forth a good title; and I lay but
 little stress on this case as reported, because it is not ne-
 cessary that a plaintiff in trespass should set forth any title,
 so it is expressly held in the case of *Radborne v. Ken-
 nels*, 3 *Salk.* 354, where a distinction is made between
 trespass and replevin in this respect. And the only reason
 is given by *Yelverton* for the opinion of the Court is
 that the plaintiff might as well have said "*Robin Hood* in
Woodstock stood:" *Yelverton* was counsel in that case; and
 I am satisfied that it was his own witticism which he has
 pleased to father on the Court, and that no Judge
 when

1740. when he was solemnly pronouncing judgment could make use of so ridiculous an expression.

LAMBERT
against
STROOTHER:

The case in *Lutwich* goes upon another point : but it is said that the plaintiff's replication was ill, and that he ought to have replied just in the same manner as the plaintiff has done in the present case. But this not being the judgment in the present case, but only an obiter dictum, I do not rely much on this authority.

In order to make the present case intelligible, and to shew the reason of our judgment, I shall consider a little how these pleas of freehold in actions of trespass came to be at first introduced ; for they seem a little absurd, and if they had not prevailed for so many years, but it was at present a new matter before the Court, I should be of opinion that it is not a good plea. For every plea in bar (admitting the fact that is pleaded to be true) ought to be a full bar to the action : but this is plainly not so ; for though the place in question be the defendant's freehold, the plaintiff may have a good cause of action, as if he hold by lease under the defendant, or under another person who conveyed the reversion to the defendant, or even though he has no right at all if he has been in quiet possession a great while, for in that case the person having a right must bring an ejectment and cannot enter upon him by force. But, notwithstanding this, as these pleas have so long obtained (*a*), it would be too much to over-rule them generally, but I think even still in some cases (*b*) they ought not to be held to be good pleas.

The reason why they were at first introduced seems to be this ; anciently most declarations of trespass were general, only for breaking and entering the plaintiff's close in such a place, without giving any name to the close :

(*a*) But the defendant may give evidence of title under the plea of not guilty ; *Bartholemew v. Ireland*, *Andr.* 108 ; and *Dodd v. Kyffin*, 7. *Durr.* & *Eall*, 354.

(*b*) They are not allowed in actions of trespass for taking chattels. To trespass for taking and carrying away the plaintiff's trees, the defendant pleaded that the place where the trespass was supposed to have been committed was his freehold, and so justified &c : " And upon a demurrer to this plea it was adjudged ill ; for this is no plea to a trespass de bonis asportatis, but peculiar only and proper to a trespass quare clausum fregit." *Allene v. Hutchinson*, *Carth.* 176. *Elmis v. Lumbe*, 6 *Med.* 117. S. C.

but

w always in this court, by reason of the rule made 1742, 1654, *Book of Rules*, p. 38. (and I believe most only in *B. R.*) the plaintiffs in their declarations in *LAMBERT* is set forth the names of the closes as the plaintiff *against* *STROTT & CO.* ne in the present case.

formerly when a plaintiff only declared generally, thought a great hardship on a defendant to be obliged to answer such a general charge; for if the plaintiff charge estate in the township the defendant could not which of the closes he would assign his trespass, and were they gave the defendant leave to plead the general issue to oblige the plaintiff to make a new assignment and ascertain the place in his replication: if he did not the defendant pleaded generally, as he might at the place in question was his freehold, the hardship would be turned on the plaintiff; for then if the defendant could prove any one place in the township to be a freehold, the plaintiff would be gone, as is expressly in the case of *Elwis v. Lombe*, 6 *Mod.* 117, 118, (a). And it is said in that case and likewise in all other cases that when the plaintiff is general in his declaration the defendant shall be allowed to be as general in his plea; these pleas are therefore called compassers, sometimes bars at large, and sometimes blank as in *Cro. Car.* 384, *Cro. Jac.* 594, and several books. And as such it was doubted whether they were traversable or not in the case in *Cro. Jac.* 594; judges, against one, were of opinion that they were not no judgment was given. I think it is very clear they are traversable, and I wonder whence the doubt arise; for if they were not traversable, the defendant might at any time bar the plaintiff by such a plea, by saying that the locus in quo was called by such a name that it was his freehold mentioning the very name of the place where the trespass was committed; for in that case the plaintiff could not traverse it, he must necessarily lose his cause, for he cannot make a new assignment unless the defendant gives the place a right name.

that this was the reason of these pleas originally, appears from the words of the rule before mentioned, which

Vid. Goodright d. Balch. v. Rich and another; per Lawrence J. 7 Q. B. 335; accord:—Dy. 23, b. cont.

Says

1745. says that for the future the declaration may mention place certainly *and so prevent the use and necessity of common bar and new assignment.*

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against
SIBBOOTHER.

As these were the reasons for admitting such a plea this, I doubt very much whether this be a good plea in the present case where the plaintiff has named the place in his declaration. The reasons for this plea do not hold here; there is no hardship on the defendant, and the plaintiff has ascertained the place; nor can the plaintiff make a new assignment in his replication; if he did it would be a departure in pleading. If therefore it is necessary in this case to give an opinion upon this point I am inclined to be of opinion (as at present advised) the plea is not good (*a*).

But we being all of opinion that the replication is good and a proper issue tendered, there is no occasion to give a positive opinion on the plea. If only one single matter be put in issue by this replication, videlicet, whether the freehold of the defendant or not, it must be admitted that the replication is good; and I think clear that this is the only thing that is put in issue by this replication, and that the other words, "that it is the freehold of the plaintiff," are either to be rejected as surplusage or to be considered only as an inducement.

Put the words only thus, and the matter will still be plainer; let the plaintiff say that it is his freehold, *ad hoc* that it is the freehold of the defendant, in that it would be plainly only an inducement, and yet that exactly the same case as the present. For, as I shew before in a former case, the distinction between traverses and denials which we meet with in some of the books is a distinction without a difference; for they are exactly the same thing.

(a) See 14 Hen. 8. 4. pl. 3; 14 Hen. 8. 24. pl. 3; and *Bre. Treas.* 168. But see contr. 15 Edw. 4. 23 and 24, *Hob.* 16; and the opinion of *Blackstone J.* in *Martin v. Kesterton*; 2 Bl. Rep. 1089 in cases where it is in general. It is true that in the rules of Court of C. B. made in 1654, *f. 15* ordered that "The common bar and new assignment be forborne when the declaration contains the certainty equivalent to a new assignment;" but how far a rule made by one of the Courts can control the general law of the land or how a plaintiff can avail himself of this rule in a superior Court to which the record may be removed by writ of error?

And it cannot be said that this is an immaterial issue :
 r the plaintiff may have no cause of action though the
 ce in question be not the defendant's freehold, because
 en the defendant has put his case upon this, he is es-
 oped afterwards to insist on any thing else ; if he did,
 would be a departure in pleading.

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In order to illustrate this a little more, I shall take no-
 e that a plaintiff may reply three ways to such a plea
 freehold, according as his case is ;

1st, If his title be inconsistent with the defendant's
 a, as that he insists that it is his freehold, or the free-
 ld of another person, then he must traverse the de-
 ndant's plea ; and as trespass is a possessory action, I
 ink it is perfectly indifferent whether he sets forth his
 n title or not ; and it was held that he need not in the
 se in 3 *Salkeld* before cited. If indeed the declaration
 general, and the plaintiff upon the defendant's plea of
 erum tenementum makes a new assignment of the whole
 spais, he cannot traverse the defendant's plea of free-
 ld, according to the case of *Prettyman v. Lawrence*,
 o. *Bliz.* 812 ; because the defendant ought to have an
 opportunity of answering to the new assignment, which
 in the nature of a new declaration.

2dly, If he derives his title under the defendant, then
 be sure he must not traverse the defendant's plea, but
 ust admit the freehold to be in the defendant and insist
 a lease or some other title under him, and then the
 verse must come on the part of the defendant.

3dly, If the plaintiff has a middle case, and neither
 rives a title under the defendant, nor has a title incon-
 sistent with his, he may plead as in the case of *King v.*
oke, Cro. Car. 384, where the defendant pleaded that
 e locus in quo was his freehold and the plaintiff replied
 ut before the defendant had any thing in the premises
 e Marquis of *Winchester* was seised of them as his free-
 old and made a lease for years to a person under whom
 e claimed which was then subsisting, without either con-

Q

fessing

1740. *Lambert against Stroother.* fessing or denying the defendant's plea, and it was ho on a demurrer to be a good replication; for it was f cient to maintain the plaintiff's action if true, even tho the freehold were at that time in the defendant, the plaintiff was not necessarily confutant in whom the f hold and reversion were. But that is not the case h The present case is of the first sort; for here the plai denies the defendant's plea, and has made no new aff ment; neither could he, having ascertained the plac his declaration. Therefore for the reasons aforel we are of opinion that the replication is good (a), not liable to the objections in the demurrer or any of other objections; so judgment on this demurrer, wl is the only matter now before the Court, must be the plaintiff (b)."

(a) The same point again occurred in the case of *Parry v. Wathen Oshers*, Hil. 1747, b, C. B., when it received a similar determination. The defendants pleaded that the closes mentioned in the declaration were the close and freehold of the defendant *Wathen*, and that he in his own right and the defendants as his servants and by his command entered &c. The plaintiff re that the said closes were the closes soil and freehold of him (the plaintiff) not the soil and freehold of *Wathen* &c.; concluding to the country. The replication the defendants demurred specially, because it contained a traverse which it ought not to have contained, because the traverse and inducement it were nought; and because the replication ought to have concluded with averment, and not to the country—And after argument by *Belfield Serjt.* the defendants and *Skinner King's Serjt.* for the plaintiff, the Court recognised the case of *Lambert v. Stroother* gave judgment for the plaintiff. MS. A Ch. J.

(b) It was probably an incorrect note of this case that induced Mr. J. to make the observation which he did in *Martin v. Kesterton*, 2 Bl. Rep. 1 (where the defendant demurred to a declaration in trespass because the plaintiff had not named the closes in the declaration) namely, that in this case *A Ch. J.* held "that the plaintiff was not at liberty to declare generally, so make it necessary to plead the common bar, and reply it by a new assumpsit."

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BENNETT *against* **ROBERT REEVE** and
Five Others.

M. 14 G. 2.
Thursday,
Nov. 27th.

following opinion of the Court was given by

Common
"append-
ant" only
belongs to
arable land.
—Levancy
and couch-
ancy are in-
cident to
common ap-
pendant as
well as to
common
appurtenant.
—Therefore
common
appendant
can only be
claimed for
so many
cattle as are
necessary to
plough and
manure the
tenant's ara-
ble land.

, Lord Chief Justice. "Replevin; For that defendants on the 28th of *September* 1737 at the parish in the county of *Somerset* in a place called *Somer* took the cattle, viz. sixty-four sheep of *Robert* and detained them &c. Damage 40*l*.

Defendants justify the taking as bailiffs of *Richard* Esq. and say that the place called *Somer Leaze* is and at the time when &c was a certain waste pasture containing by estimation one hundred land lying and being at *Mark* aforesaid; and said *Richard Fownes* long before and at the time was and still is seised in his demesne as of fee of the said waste or great pasture where &c, and be- said sixty-four sheep at the time when &c were id waste or great pasture depasturing on the grafs re growing and treading down the soil there g damage there to the said *Richard Fownes* they *Robert Reeve* &c as bailiffs to the said *Richard* well acknowledge the taking of the said sixty-four the place where &c, the said sheep so being in waste &c so depasturing &c; and this they are verify; wherefore they pray judgment and a f the sheep and their damages, &c.

4 Vin. Abr.
583. pl. 6.
S. C.

Plaintiff pleads in bar to the avowry, that long be- time when &c and at the time when &c one *Biggs* was and yet is seised of one acre of land of *Her* with the appurtenances lying and being in the parish of *Wedmore* in the county aforesaid. mesne as of fee, and that he the said *Philip Biggs* his ancestors and all those whose estate the said ad in the said acre of land time out of mind have used and been accustomed to have and use for and themselves his and their farmers tenants and ants of the said acre of land of *Old Auster* com-

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BENNETT
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REEVE.

mon of pasture in the said place called *Somer Le* wherein &c for all their commonable cattle every and at all times of the year as appendant to the said ac and the said *Philip Biggs* being so seised of the said long before the said time when &c to wit on the 4th *November* 12 *W.* 3. by his deed of indenture sealed his seal for the consideration therein mentioned did grant and demise all that the said acre of land to one *Thomas* his executors administrators and assigns from thenceforth for and during and until the full end and of ninety-nine years if *William Anne* and *Evan* sons daughter of the said *Evan* (the father) or any or either of them should so long live, as in and by the said indenture &c; by virtue of which said grant the said *Evan* father afterwards and before the said time when &c entered on the said acre and was possessed, and being possessed afterwards and before the said time when by his deed of indenture sealed with his seal bearing the 20th of *April* 1724 for the consideration therein mentioned did grant and demise unto *Robert Bennett* his executors &c one yard parcel of the said one acre of land *Old Auster* for and during all the rest and residue of the said term of ninety-nine years &c as by the said indenture &c; by virtue of which said last grant and demise said *Robert Bennett*, the father of the plaintiff, afterwards and before the time when &c entered into the said yard parcel of the said one acre, and was possessed thereof and being so possessed afterwards and before the said time when &c made his last will and testament in writing on the — day of — in the year —, and then constituted and appointed the plaintiff his son his sole executor, and afterwards and before the said time when to wit on the — day of — in the year aforesaid died possessed of the said yard parcel of the acre; after whose death the said *R. Bennett* the plaintiff took upon himself the burden and execution of the will, and before the time when &c entered into the one yard parcel of the said acre of land and was and is possessed thereof; and the said *Robert*, the plaintiff, sheweth that the said *William Thomas* and *Evan Thomas* sons of the said *Evan* the father and each of them are now living; that the said *Robert* the plaintiff being possessed of the one yard parcel of the said acre of land to which common of pasture aforesaid in *Somer Lease* is appendant

afore

resaid did before the taking of the said cattle to wit on 28th of *September* 1737 put the said cattle, being the per cattle of the said *Robert Bennett*, the plaintiff, in and upon the said place called *Somer Leaze* in which to use his said common there and feed and eat the s and herbage ther and there growing, as it was law for him to do, and the said *Robert Reeve* and the other endants afterwards on the said 28th of *September* 1737 he said place in which &c took the said cattle of the *Robert Bennett* the plaintiff viz. the said sixty-four ep then and there feeding and using the said common then unjustly detained &c; and this he is ready to ve- wherefore he prays judgment and his damages &c; brings into court the letters testamentary &c.

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The defendants reply; and protesting that the said *ilip Biggs* &c had no such right of common as is set th in the plea as appendant to the said acre, they say t the said sheep in the declaration mentioned at or be e the time of putting the same into the said place called *Somer Leaze* in which &c were not nor was any or either them levant and couchant in and upon the said one rd land parcel &c; and this they are ready to verify, d pray judgment and a return, &c as before.

The plaintiff demurs to this replication, and shews for use that the plea aforesaid pleaded by way of reply, and e matter therein contained, is not issuable, nor doth it nsefs avoid or deny the plaintiff's plea above pleaded c.

The defendants join in demurrer.

The case comes before the court (a) on this demurrer f the plaintiff to the defendants' replication.

And the single question is whether levancy and cou- hancy is incident to common appendant as it is admitted e be to common appurtenant; for if it be incident to

(a) It appears that this case was twice argued; the first time on the 22d of *November* 1739 by *Gapper* Serjt. for the plaintiff, and *Draper* Serjt. for the defendants; the second time by *Wynne* Serjt. for the former and *Burnett* King's serjt. for the latter on the 10th of *May* 1740.

1740. common appendant, then the replication puts a material matter in issue, and consequently the demurrer is not good. Besides, if this be so, judgment must be for the defendants for another reason, because the plaintiff has confessed by his demurrer that the sheep were not levant and couchant on the premises.

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REEVE.

Whether this levancy and couchancy ought to have been pleaded by the plaintiff or not we need not determine at present, because this point may perhaps be a little more doubtful; and as it is insisted on by the replication, if it be material, for the reasons I have before mentioned, that is sufficient to over-rule the demurrer.

Several other little objections were likewise taken to the plaintiff's plea in bar, which I shall take no notice of, because they seemed to be of no great weight.

But the single question that we shall consider is whether in the case of common appendant, as well as common appurtenant, the cattle ought to be levant and couchant; and this could never have admitted of a doubt if the nature of common appendant had been thoroughly considered and well understood. But the doubt arose only from a mistake of the nature and original of common appendant. For it was said by the counsel for the plaintiffs, and some books were cited for that purpose, that the tenants of arable land were obliged to plough the land of their lords, and that, as by their tenure they must keep cattle for that purpose, it was therefore incident to their estates that they should have common for such cattle in the wastes of their lords.

But this notion is neither founded in law or reason, and when it comes to be considered is attended with great absurdities. It is true indeed that common appendant only belongs to arable land, as is expressly said in *Co. Lit.* 122. a. &c (a), and it is so necessarily incident to it that it cannot be severed. And therefore if the land be divided never so often, every little parcel is entitled to common

(a) See also 26 Hen. 8. 4. a. pl. 15.

ndant, (as it is claimed in the present case only for a of land.) And this shews the absurdity of the notion I before mentioned, because if that were so, every who has a yard of land to which common append- belongs would be obliged to keep a team of horses or to plough his lord's land and would have a right of mon for them in the lord's waste. But that this is he reason of common appendant appears also from that a man may have common appendant for heifers sheep, which are of no use in ploughing, but are of t use in manuring the land. And so it is expressly in 1 *Rel. Abr.* 397. and seemed to be admitted by ounsel for the plaintiff; and it was necessary for o do so, the common claimed by the plaintiff in present case being for sheep.

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he reason therefore for common appendant appears : this, that as the tenant would necessarily have occa- for cattle, not only to plough but likewise to manure wn land, he must have some place to keep such cat- whilst the corn is growing on his own arable land, therefore of common right (if the lord had any e) he might put his cattle there when they could not n his own arable land. This is a sensible and intel- le reason for this custom, and is said to be the reason . *Lit.* 122. a. And this being admitted to be so, it an end to the present question. For from hence it ain that the tenant can only have a right of common such cattle as are levant and couchant on his estate, is, for such (a) and so many as he has occasion for ough and manure his land in proportion to the quan- thereof. And if he has a right of common for no e, no absurdity will follow, let the land be divided r so often and into never such small parcels : whereas he present case it is absurd and unjust on the face of it : a person, who has but one yard of land, should have ght of common for sixty-four sheep.

his being the nature of common appendant, it is n that a man cannot have a right of common append- for any cattle but such as are wanted either to plough manure his land. And it is as plain likewise that he

^d) And therefore a plea, claiming common appendant for all kinds of e, cannot be supported. 37 *Hen.* 6. 34.

cannot

1740. cannot for cattle which he borrows, unless he make use of them all the year to plough or manure his land.

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Having thus shewn the nature of common appendant, the present case is (I think) so very plain that I need hardly mention any authorities to support it.

But as some persons are of opinion that if a case be never so plain it ought to be supported by authorities, I shall take notice that this is expressly said to be law in *Tyringham's case*, 4 Co. 36. b., and that common appendant is only for such cattle as are levant and couchant on the land; and the reasons there given for it are much the same as I have already laid down, and therefore I shall not repeat them. The same is likewise held in 1 *Rel. Abr.* 398; and there are several cases out of the Year Books cited there for that purpose. There were likewise several other cases cited on the part of the defendants out of *Gre. Jac.*, *Palmer*, *Levinz*, *Ventris* &c: but I forbear to mention them, because on looking into them they are all so very obscurely reported that it is not possible to say whether the common there in question were common appendant or appurtenant, which are frequently confounded in the books; and therefore I do not at all rely on the authority of those cases, nor does the present case want it.

There are indeed some cases in the old books, and some of them were cited on the part of the plaintiff, which speak of common sans nombre, and which seem to imply that levancy and couchancy is only necessary in the case of common appurtenant, and not in the case of common appendant. But the notion of common sans nombre, in the latitude in which it was formerly understood, has been long since exploded, and it can have no rational meaning but in contradistinction to stinted common where a man has a right only to put in such a particular number of cattle.

But to say that a man who has but one yard of land, as in the present case, shall have a liberty of common right (as common appendant is) of putting in as many cattle as he pleases upon his lord's waste though consisting of many thousand acres, without any regard to the levancy

ry and couchancy, is so very wild a notion that I
er it could ever be entertained by any one who
ht twice. The writ of admeasurement and the
of approvement by the lord both likewise plainly
that there is nothing in this notion. For how can
e admeasured which hath no bounds? Or how can
ord, when he approves, leave sufficient common for
nants, if they have a right to put in as many cattle
y please?

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will say no more in a case that I take to be so very
but that we are all of opinion that the plaintiff's de-
er must be over-ruled, and that judgment must be
for the defendants."

LES an Attorney *against* TRAHERN and
ETTY.

Friday,
Nov. 28th.

HIS was an action of assault and battery and false im- When either
prisonment, laid in *Middlesex*, by an attachment of of the Uni-
lege; to which the defendants pleaded a joint plea verities
ification, in which it was alleged that *Trabern* was claims con-
f the proctors of the University of *Oxford*, and that sance of a
was keeper of the gaol there; that the plaintiff was cause, it must
mitting disorders in the night-time within the pre- be claimed
parlance.
of the University, wherefore *Trabern* as proctor —When an
shended him and committed him to the custody of the attorney is
plaintiff,
defendant, as he lawfully might by the charters whether the
University is
ed to the University and by the laws and statutes of entitled to
consuance of
ame; traversing being guilty of the said trespass &c the cause?
Westminster or elsewhere out of the precincts of the
erity.
Qu.
Barnes 346.
Pract. Reg.
696. and
5 Vin. Abr.
590. S. C.

the plaintiff admitted the privileges of the University
hat *Trabern* was proctor &c, but replied that the de-
nts of their own wrong and without the residue of
ause by them alleged in their plea assaulted and im-
ned him &c.

fore a rejoinder was put in, the Chancellor &c of
University claimed consuance of the cause (a); after
their

The claim was entered in the following manner (1);

Michaelmas

If the claim be not so made, it cannot be allowed. *Leasingby v. Smith*,
if 406.

1740. their claim had been argued at the bar, the Court took time to consider of it, and on this day the judgment of the Court was given as follows by

WELLES
against
TRAHERN.

Willes

"Michaelmas term in the 13th year of King George the Second. Known men by these presents that we Charles Earl of Arran Chancellor of the University of Oxford have made and appointed and in our place put and by these presents do make appoint and in our place put Henry Wilmot and Nicholas General Gentlemen and either of them our true and lawful attorneys jointly and severally for us and in our name and stead to demand ask claim and defend all and singular the liberties and privileges of the said University, and especially to claim and demand to have as well the consueance of a certain action of trespass depending in his Majesty's Court of Common Pleas at Westminster between Paul White Gentleman one of the attorneys of the said Court plaintiff and Edward Trahern clerk and Charles Eddy defendants. which said defendants are privileged persons of the said University, as of all and singular pleas plaints and causes whatsoever (mahem felony and freehold only except) where a scholar or other privileged person of the said University is one of the parties in the Court of the University aforesaid to be held before us the said Chancellor or commissary or deputy for the time being, and also to claim demand and defend all and all manner of liberties and privileges of the University aforesaid for any person whatsoever rightly and lawfully privileged; dated under the seal of the office of Chancellor of the University of Oxford the 28th day of June in the 13th year of the reign of our Sovereign Lord George the Second by the Grace of God of Great Britain France and Ireland King defender of the Faith, &c. and in the year of our Lord 1739.

Elsewhere as it appears of last Trinity term upon the Roll it is thus contained, Middlesex to wit Edward Trahern clerk and Charles Eddy were attached for (here followed the declaration, plea, and replication.)

And thereupon cometh Charles Earl of Arran Chancellor of the University of Oxford by Henry Wilmot his attorney above named to ask and claim prosecute and defend all and singular the liberties and privileges of him the said Chancellor, and thereupon he prays his liberty, that is to say, to have the consueance of the plea aforesaid before him the said Chancellor his commissary or his deputy to be held at Oxford, because he saith that the Lord Henry the 8th late King of England by his letters patent in due form of law made and under his great seal of England sealed bearing date at Westminster the 11th day of April in the 14th year of his reign granted to the then Chancellor and scholars of the said University of Oxford and to their successors (amongst other things) that the said Chancellor his commissary or his deputy and their successors or the steward under-steward and other Judges of the said Chancellor and his successors deputed by their letters sealed under the seal of his office should hear and determine as well all manner of trespasses and other offences whatsoever as also or misprisions extortions conspiracies confederacies maintenances false allegations accounts contracts and injuries whatsoever, and all other articles which might fall in fine or correction or in other pecuniary punishment, and of all other contracts pleas and complaints personal and other causes and matters whatsoever and whatsoever name they are or may be comprised, although they should concern the said late King himself his heirs or successors (affrizes and pleas of freehold only excepted) after what manner soever arising done or committed or to be done or committed within the town of Oxford the suburbs hundred or county of Oxford aforesaid or elsewhere within the kingdom of England, as well at the suit of our Lord the said late King his heirs or successors as at the suit of the party or otherwise howsoever, where the scholars or their servants or ministers or any other persons who ought to have any privilege of the said University whom the said Chancellor commissary or his deputy or their successors

Tilke Lord Chief Justice. "There are two points 1740.
is case; 1st, Whether the University of *Oxford* have *WELLES*
against
TRAHERN.

should challenge was or should be one of the parties, and that they should inquire by scholars or their servants or by the laity of the said town of or by others, and should have full consueance and correction thereof and all complaints causes and matters in whatsoever place soever within the *Oxford* or the suburbs thereof or the precincts of the said University as did think fit, and execution thereof according to their statutes and according to the law of *England* at the will of the said Chancellor or his deputy and their successors should do and make, and should hear and determine all and singular the said articles causes matters and complaints as before excepted,) and should have levy and perceive all and all manner mercenaries issues forfeitures and profits coming therefrom to the use of the said University by themselves and their deputies for ever; so justice assigned to hold pleas before the said King or his heirs or justice of the Common Bench justice of assize justice of gaol delivery or keeper of or justice of servants labourers and artificers or other justice or judge or steward or marshal or clerk of the market of the household of the King *Henry* the 6th or his heirs sheriff mayor bailiff or other officer or of the said late King or his heirs whatsoever should in any sort intermeddling such pleas quarrels contracts articles causes matters or other things or concerning any of them (except as before excepted) done or to be done in the said town of *Oxford* the suburbs or precincts thereof or elsewhere in the kingdom of *England*, neither in the presence nor absence of the said King or his heirs; and if the same justices or other ministers of the said King or any of them in the presence or absence of the said late King or his heirs should for the future presume to inquire intermeddle or take any consueance or concerning any of the premises (except as before excepted), the same and other ministers and officers aforesaid on the certificate notification or petition of the Chancellor of the University aforesaid who should be for the time being or commissary or his deputy should supercede such inquisition and execution or process and all executions to be had thereon whatsoever, and should of any further in any sort intermeddle nor put the party to answer therefore them, but that the party aforesaid only before the Chancellor and his commissary or deputy thereof should be chastised and punished in respect, as by the same letters patent more fully appeareth. And the said King further saith that by a certain act in the Parliament of the Lady *Mary* late Queen of *England* begun and holden at *Westminster* in the county of *Devon* on the 2d day of *April* in the 13th year of her reign (amongst others) it was enacted by the authority of the said Parliament that the said consent of the said late King *Henry* the 6th the most noble father of the said King's highness made and granted to the said Chancellor and scholars of the University of *Oxford*, bearing date on the said 1st day of *April* in the 5th year of the reign of the said late King, and also all other letters patent of the progenitors or predecessors of the said Lady the Queen made to any corporate of the said University of *Oxford* or to any of their predecessors of the said University by whatsoever name or names the Chancellor matters of the same University in any of the said letters patent have been at that time named, should from thenceforth be good effectual and available law to all intents constructions and purposes to the then Chancellor master or officers of the said University and their successors for evermore after and according to the form words sentences and true meaning of every of the said letters patent

1740. have claimed the consuance in time ; 2dly, If they
 WELLES claimed it in time, whether they are entitled to it in
 against present case.
 TRAHERN.

patent as amply fully and largely as if the same letters patent had been verbatim in the then present act of Parliament, any thing to the contrary notwithstanding ; And further it was enacted by the authority aforesaid the said letters patent of the said Queen's highness's late father King *Hen* 8th, bearing date as is before expressed, made and granted to the said body of the said University of *Oxford* and all other letters patent by any progenitors or predecessors of the said Queen's highness and all liberties charters immunities quietances and privileges lets law-days and other things soever therein expressed given or granted to the said Chancellor masters scholars of the said University or to any of the predecessors by whatsoever the said Chancellor masters and scholars of the said University in any of letters patent were named by virtue of the then present act were from forth ratified established and confirmed unto the Chancellor masters and of the Universities aforesaid and to their successors for ever, any statute in custom contrivance or any other thing to the contrary in anywise notwithstanding ; as by the same act (amongst other things) more fully appeareth. The said Chancellor further saith that the said *Edward Trahern* and *Charles* the day of the issuing out of the original writ of the said *Paul* and at the when the causes of action of the said *Paul* accrued and before that time continually since hitherto were and are and each of them is privileged persons said University, that is to say, the said *Edward Trahern* was and is a master and fellow of *Brazen-Nose College* in the said University, and one proctors of the said University dwelling and residing within the said University and therein matriculated, and the said *Charles Ety* was and is a minister of the Chancellor masters and scholars of the said University, to wit, of the school in the said University within the jurisdiction thereof ; and causes of action specified in the said declaration of the said *Paul* arose : accrued within the liberties of the said University, that is to say, at *Oxford* said ; and that the said *Edward Trahern* and *Charles Ety* were and subject and ought to be summoned and impleaded for the said causes and in the said declaration specified before the Chancellor of the University : his commissary or his deputy and not elsewhere nor in any other Court whither. And the said Chancellor saith that he the said Chancellor his commissary deputy of the University of *Oxford* aforesaid and all his predecessors cellors of the said University for the time being their commissaries or ever since the making of the letters patent aforesaid always hitherto have consuance of all pleas aforesaid (except as before excepted) concerning or in any manner any master or scholar of the University aforesaid for the time or their servants or any common minister of the University aforesaid or a privileged person of the said University ; and this the said Chancellor is ready to wherefore the said Chancellor prays the liberty aforesaid and consuance of plea in the said court of our Lord the King of the Bench here, to wit, at *West* now between the said parties depending by virtue of the letters patent aforesaid by force of the said statute to be allowed to him &c. And the said Chancellor saith that formerly to wit of the term of *Easter* in the 9th year of the late Majesty Queen *Ann* the then Chancellor of the said University in the of the said Queen before the Queen herself at *Westminster* in a certain trespass upon the case then depending between *William Riley* and *William* by plaintiffs and *John Stonell* defendant claimed his said liberties and privi-

unfel spoke only to the first point, because if
 should be of opinion that it was not claimed in ^{1740.}
 re was no occasion for entering into the other WELLES.
 id we are all of opinion that it was not claimed ^{against}
 And in this we are confirmed not only by the TRAHERN.
 the case but by several cases in which this point
 so determined.

ne that has been laid down in several cases is that
 crsity must come before imparlance : whereas in
 it case they were so far from coming before im-
 that they did not come until after a replication
 tendered. And though it was said that the Uni-
 ight often lose this privilege if they were obliged
 before imparlance or plea pleaded, we think the
 ind inconvenience would be much greater on the
 :. For if they were not confined to the time of
 e or of plea pleaded, they might as well come
 ne before judgment, which would occasion great
 uffice and great expence to the parties. Besides,
 in that the University do not judge according to
 non law but according to the civil law ; so that
 nuisance be allowed men's properties are to be

the said plea by virtue of the letters patent of the said King *Henry*
 by virtue of the statute aforesaid to be allowed to him &c ; where-
 singular the said premises being inspected and fully understood by
 rt of the said late Queen it was considered that the consuance of the
 tween the said *William Riley* and *William Appley* plaintiffs and
Stonell in the said Court depending should be allowed to the Chan-
 said University of Oxford &c ; as by the record thereof remaining
 ne said court of the said late Queen of the said term of *Easter* in the
 of the said late Queen aforesaid upon the 330th roll more fully ap-
 the said Chancellor prays that the said record of the said *Easter* term
 and inspected, and that his said liberty and consuance of the said plea
 court here depending by virtue of the letters patent aforesaid and by
 said statute and the allowance aforesaid may be allowed to him &c ;
 ut the said Chancellor doth aver that the said *Edward Trahern* and
 y mentioned in the said declaration and the said *Edward Trahern* and
 y mentioned in the said warrant of attorney and claim above specified
 e persons and not other or different persons. And the said Chancellor
 into court the said letters patent of the said late King *Henry* the 8th
 rent seal dated the 11th day of April in the 14th year of his reign ; and
 Chancellor brings here into court the exemplification of the said act of
 under the great seal of the said Lady *Elizabeth*, Queen of Great
 sted at *Westminster* the 7th day of *June* in the 13th year of her

tried

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against
TREASURY.* tried without a Jury and by a different law from the law of the land. If an act of Parliament will grant such a jurisdiction, we cannot help it: but whenever it is granted, we ought to take care that it is kept within its legal bounds and claimed in proper time. For we are of opinion that such a jurisdiction being contrary to the law of the land cannot be granted without an act of Parliament (a), even by the King himself; no more than he can erect a new Court of Equity by letters patent which it has always been held that he cannot: and so it was expressly said in the case of *Pern v. Manners* (b) in the *King's Bench*, which I shall mention by and by.

If this were a new point, I should think myself obliged to consider all the cases that were cited on the one side and the other, and to shew how far they are applicable to the present. But I need not do it now, because this matter has been already so solemnly settled and determined in the court of *King's Bench* in the case of *Pern v. Manners* H. 11 An. upon a claim of the University of *Cambridge*, whose claim as appears by a copy of their charter which has been laid before me is in as extensive words as, if not more extensive in respect to the exclusion of all other jurisdictions than, the words in the charter of the University of *Oxford*; so that that case is a case in point. And in that case it was adjudged by the whole Court, after a long argument in which almost all the cases that have been now cited were mentioned and after great deliberation, that the University of *Cambridge* who then claimed their consueance within five days after the imparlance and before any plea pleaded came too late, for that they ought to have come the first day that there might be no delay of justice, and because the consueance there claimed (and it is the same in the present case) would oust the party of the benefit of the common law and of a trial by jury; and they relied on several cases in the Year Books, particularly the 6 Hen. 7, 9, b. and 16 H. 7. fo. 16. a. (c). This case was afterwards cited and allowed to be good law in the case of *Baker v. War-*

(a) Vid. *Hardr.* 509

(b) This case has been since reported in *Fort. Rep.* 155; and is also to be found in 5 *Vin. Abr.* 588, pl. 21; and 589, pl. 22.

(c) See also the Bishop of *Ely's* case, 1 *Sid.* 103; *Parker v. Edwards*, 1 *Shew* 352; *Leusington v. Smith*, 2 *Will.* 310; and *R. v. Agar*, 5 *Barr.* 282.

at case.

er therefore having been already so solemnly
I shall only take notice of a case or two which
re not cited in the argument of *Pern v. Man-*
one that was subsequent to that case.

case that I shall mention is the case of ancient
atch 83, 84, the case of *Marshall v. Allen*,
holden that a man may plead ancient demesne
parlance : but it is said there that that is the
ere it is so, and that stands upon a very dif-
from the present ; for in the case of ancient
man may not only plead it after impar-
tenant in ancient demesne may even reverse
n completed or a final judgment given
in a real action by writ of disseisin ; and the
cause so long as the fine or the judgment re-
versed the privilege is entirely gone, and the
or ever thereafter pleadable at common law,
d be very hard. But in the present case,
University should come too late now, they
lose the consueance of the present cause, and
e their jurisdiction in all causes hereafter in
a manner as before.

s been a case likewise before me (*b*), which
d : but this is a strange case, and must certain-
ly of power rather than of judgment : for it

1740. was even before the charter of *Hen. 8.* and the stat
Eliz; when there was no pretence that the Unive
 WELLER had a right to such an exclusive jurisdiction; and th
 against fore I lay no weight upon it.
 TRAVERS.

The only other case that I shall mention is that of *Alk*
v. Dr. Stratford(a), which was in the *Trinity* term;
 the case of *Pern v. Manners*, and there the Lord *Hart*
 allowed the jurisdiction of the University of *Oxford*;
 I shall only just mention it, because I gave you the
 history of it and my opinion upon it at large when it
 cited by the counsel for the University. And for
 sake of Lord *Harcourt*, who was as great a Judge
 ever sat in *Westminster-Hall*, and made as few mist
 as any one, I will not repeat what I then said. I
 only say thus much of it at present, as it was a judge
 given by him without any reasons and directly contra
 the strongest reasons that he himself had laid down
 about a week before in the same case, it is a case
 has no weight with me; for I will not be influenced
 any judgment that is founded either on fear or favour

Having said thus much on the only point that
 comes before the Court, it is not necessary to say any
 on the other point; because, as our opinion is that
 University have not claimed this cognisance in time,
 not material whether they were intitled to it or not in
 present case. But give me leave to say thus much
 it, that there are cases in which it has been adjudged
 where an attorney is plaintiff the privilege of the Uni
 sity cannot take place (b); because the privilege of a
 nies suing in their respective courts is by reason of
 necessary attendance there for the sake of justice and
 benefit of all the people of *England*; and as they
 been entitled to this privilege time out of mind, no c
 ter of the King can take it away from them, nor eve
 act of Parliament, unless they are therein menti
 by express words. And so it is expressly determined
 case in *Lit. Rep.* 304., which is in respect to the Uni
 sity of *Oxford* and an attorney of this court; and is fou
 ed on *Butt's* case 1 *Rel. Abr.* 489, and Lord *Audley*,

(a) 22 *Vin. Abr.* 11. pl. 13.

(b) And the claim can only be made in respect of *residents* members.
v. Long, Clerk, 2 *Wyll.* 310.

3 *Leon.* 149., which cases do not relate to the Universities (a), but to other jurisdictions; but the same line is there laid down.

1740.

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need not give my opinion of these cases, nor say how agree with them till the matter comes judicially before us. But whenever it does, though I shall be as tenacious of the privileges of the University of Oxford as any living, having the greatest veneration for that aged body, yet I hope I shall always as far as I can by endeavour to support the common law of the land and excellent method of trial by juries, upon which all our liberties and properties depend; and that I shall endeavour as far as I can to prevent the encroachment of jurisdiction whatever that proceeds by another law or another method of trial.

At present I need only say that we are all of opinion that this consuance is not claimed in time, and that therefore it must be disallowed."

That in *Littleton* was a case relating to the University of Oxford, in which an attorney to the Court of Common Pleas, sued the defendant a clerk of the University, and the claim of consuance was denied.

HEN HUGGINS against THOMAS BAMBRIDGE.

H. 14 G. 2.
Friday,

Feb. 16th

A contract with the warden of the Fleet (who held only for life under the crown) that for a sum of money he should surrender the office to the King, to the intent that

The opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "Debt on a bond, dated 28th of September 1728 in the penalty of 5000*l.* page 10*l.*

The defendant prays oyer of the bond and condition, which was for the payment of 2500*l.* on the 29th of September 1730 with lawful interest for the same; and then sheweth letters patent 22d July 12 Anne, whereby the Queen

did procure from the King a grant of the office to the purchaser is void by stat. 5 and 6 G. 2. c. 16; though that office has been, and may be, granted to a subject in fee;—and a debt given to secure the payment of such consideration-money cannot be enforced in a court of law.

—It is not sufficient in a plea to an action on such a bond to state generally that the case is within the statute: the defendant must set forth in his plea facts to shew that the case is within the statute.

—The exception in the stat. 5 and 6 Ed. 6. c. 16. that the act shall not extend to any office which any person is seized of any estate of inheritance, means only offices of which subjects are seized of estates of inheritance.

R

grat.

1740, 1. grants the office of warden or keeper of the Fleet, the custody of the prison and gaol of the Fleet the more particularly described, and several messuage lands thereunto belonging, and all it's profits appurtenances &c, to the plaintiff for life, to be executed by or his sufficient deputy or deputies; and that by the letters patent Queen *Anne* granted the same office to *John Huggins*, son of the plaintiff, to hold to his life in the same manner after the death surrender or other determination of the estate and interest of the plaintiff therein. That by virtue of the said letters patent plaintiff was seised of the said office &c as of fee and hold for the term of his life, the reversion belonging to his said son for his life. And the defendant avers that the said office time out of mind hath touched and concerned and still doth touch and concern the execution of justice and goes on and pleads that on the 2d of *August* 2 it was corruptly and contrary to the form of the statute that case made and provided bargained and agreed between the now plaintiff and the defendant and *D Cuthbert* Esq: that the plaintiff being seised of the office and premises, the reversion belonging to his aforesaid, and the said office being an office which touched and concerned and still doth touch and concern the execution of justice as aforesaid, the plaintiff *John* his son should surrender and yield up into the hands of the King the said several offices and premises & all their estate and interest therein together with the letters patent to be cancelled, "for the intent and purpose that the plaintiff should procure a grant of the office from the King to the defendant during his life also a grant thereof from the King to *Dougall* (for life) from the determination of the estate so to belong to the defendant, and that the defendant in consideration thereof should pay the plaintiff 2500*l.* on the 29th of *September* 1730 with lawful interest for the same from the 28th of *September* 1728, and for securing payment of should by his writing obligatory to be sealed by his seal and to bear date the 28th of *September* 1730 knowledge himself to be bound to the plaintiff in and with condition for the payment of 2500*l.*, with interest as aforesaid, and that the said *Dougall* should pay to the plaintiff the further sum of 2500*l.*"

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The defendant further pleads that in performance of the said corrupt bargain and agreement the plaintiff and son on the 14th of *August* 2 Geo. 2. by deed under their seals inrolled on the 15th, reciting the said letters patent, did and each of them did surrender and yield up the said office &c and the said letters patent to be cancelled, which said surrender the King did then accept; and that the defendant in performance of the said corrupt agreement, and after the said surrender, &c, did by the deed now brought into court become bound to the plaintiff in manner and form as by the said writing brought into court is alleged with the condition thereunto written. The defendant further pleads that his present Majesty afterwards, viz. on the 30th of *September* 2 Geo. 2. by his letters patent under his great seal, bearing date on that day, for himself his heirs and successors gave and granted to the defendant the said office &c (described as before) with all the fees profits &c thereof belonging, to hold the same to the defendant for life, to be executed by him or his sufficient deputy or deputies, in as ample a manner as the plaintiff or any former warden held and enjoyed the same; and that by the said letters patent the office is in the same manner granted to *Dougall Cutbbert* for life after the death or determination of the estate and interest of the defendant therein, which letters patent pursuant to a provision therein were afterwards in the *Michaelmas* term following inrolled in this court. And the defendant avers that the said grant of the said offices and other the premises by the said letters patent made to the defendant *Dougall* was made to them as aforesaid by the procurement of the plaintiff and according to the said corrupt bargain and agreement; whereupon he saith that the said writing in the declaration mentioned brought into court is as aforesaid and for the cause aforesaid is contrary to the form of the statute, and void in law; and this he is ready to verify &c; and avers that the said office granted by the letters patent and the office concerning which the document was made with the plaintiff are the same office; and so prays judgment.

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The plaintiff demurs generally, and the defendant joins in demurrer.

R 2

This

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This is a case upon the statute 5 & 6 Ed. 6. c. 16. (a) the argument (a) of this cause two things were insisted on by the plaintiff to shew that the defendant's plea was not good;

1st, That this is not an office within the statute, be one of those that are excepted out of it.

2dly, That if it were an office within the statute, that the defendant hath not set forth enough in his plea to bring his case within the statute.

It was admitted that this is an office which concerns the execution of justice, and that therefore it is within the general words of the statute 5 & 6 Ed. 6. c. 16. against buying and selling offices, on which statute question arises. Nor could this be denied in the argument, because it is several times averred in the plea to be so, and consequently is confessed by the general denier. But what was relied on by the plaintiff, as to first point, is an exception in the act, which is in the words; sect. 4. "Provided always that this act or thing herein contained shall not in anywise extend to office or offices, whereof any person or persons is or be seised of any estate of inheritance." And it was insisted that this is an office of inheritance in the crown and that though it is granted only to the defendant for yet that the King may grant it in fee; that it hath been several times so granted; and that therefore it is within the exception.

To make out this fact that it is an office of inheritance, and that it hath been granted by the King in fee, were cited the statute 8 & 9 W. 3. c. 27. s. 11; 3 Lev. 288, and some other books; and to shew this cannot be denied. And this must be meaning (if there be any meaning) of what is obiter in the case of *Blankard v. Galdy*, reported Mod. 215 &c, that no gaoler is excepted out of the statute but the marshal of the King's Bench and warden of the Fleet, the inheritance of which office was (I suppose) at that time, or at least taken to be granted to a subject, otherwise there was no colour

(a) This case was argued in the *Exeter* term preceding by *Botham* for the plaintiff and *Agar* Serjt. for the defendant, and a second time in the term.

that they were excepted out of the statute of *Edw. the Sixth*. That this office may be granted by the fee I admit : but the question is whether, it be granted only for life, it is within the exception statute. To prove that it is cited for the plaincase of *Ellis v. Ruddle*, which is reported three times ; first in 2 *Lev.* 151. by that name ; three 3 *Kemble*, by the name of *Ellis v. Audle*, p. 552, the name of *Ellis v. Nulse*, p. 659 and 678. And : was strongly relied on (and I think it was the only : was cited for this purpose) as an authority in r the plaintiff. But this case is so imperfectly re- that it is difficult to know what to make of it. But, to be as reported by *Levinz*, it is so absurd an that I can lay no weight at all on it. The question concerning a demise for years of the bailiwick of the and it was there said that the inheritance being in g, though the question was only concerning a lease r, it was a case within the exception of the sta- but this not appearing on the plea, the parties dered to replead that it might appear on the record : inheritance was in the crown : that is all that is d in that book ; and I own if I had no further o the case, it is an authority in point for the plain- ut Mr. *Kemble*, in his first report of it, though he enlightens any thing, yet has let me into the know- f a matter which might possibly be the foundation opinion of the Court, or if not I cannot conjecture t they went ; for he says that the bailiwick of the as in the King as Duke of *Lancaster*, and if so it y was considered on the same foot as if the office he inheritance of a subject ; and in p. 659., where reported the opinion of the Court for the plaintiff repleader, he says that the office was held not to in the statute, because the franchise itself was in the King, as parcel of the Duchy of *Lancaster*. reported the case again p. 678., but there it is so igitly reported that it is impossible to make any t. If therefore the court, as it seems that they *Kemble*, went on this distinction that the office being King as Duke of *Lancaster* it must be considered same foot as if the inheritance were in a subject, ay be some foundation for the opinion of the Court ;

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Court ; but if so, then it is no authority at all in the present case. If the Court did not go upon this, I help saying that it is the most absurd opinion that ever was given, and without departing from common sense have no regard to it. For first such a construction almost overturn the whole act, and this is certain dicta constructio. For as to most of the offices particularly enumerated, as the auditorship and stewardship of the King's honours and castles, and many the inheritance is undoubtedly in the King ; and it is difficult to say to what offices it extends, if this construction were to take place ; to many offices which concern the administration and execution of justice it would not. Besides this construction is contrary to common sense and the known rules of all exceptions for no one can be excepted out of a statute made within the general words of the statute. Now, according to this construction, the King, if the inheritance in him, is a person mentioned in the exception that cannot be ; because to be sure there is no exception upon the crown ; for the King is not within an exception unless particularly named, nor can he forfeit an office nor can he be supposed to be guilty of any crime or misbehaviour. This exception therefore only operates where the inheritance is in a subject. I shall therefore say no more upon this, the construction insisted upon is so contrary to the plain intent of the statute, as being only this imperfect case to support it.

In the case of Sir *A. Ingram* stated in *Co. Lit.* and cited in *Cro. Jac.* 386, and in *Hob.* 75, as an established authority, this notion was never thought of as was the case of the cofferer of the King's household which Sir *Robert Vernon* was possessed by grant from the crown, who agreed with Sir *A. Ingram* for a sum of money to surrender his office to the King to the intent that the King might grant it to Sir *A. Ingram*, which was accordingly done. The case was referred to the Chief Justice and several of the justices, who unanimously determined that that case was within the statute of *Edward the Third* and Sir *A. Ingram* lost his office, and they held (as Lord *Coke* says) that all promises bonds and assurances given for these purposes were made void by

is a case very like the present, as I shall take 1740, 1. 7 and by, only the present is a little stronger;  not only an intent but a procurement expressly ad confessed.

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the second point, that there is not sufficient set forth in the defendant's plea to bring the case to the statute; several cases likewise were cited, shall not repeat because we admit them all, except in *P. 4 Hen. 7. pl. 9.*, which is so absurd cannot be law. They only prove that when a man takes advantage of a statute, he must set forth so much as to shew that the case is within the statute, certainly true. And we can by no means agree with Brother *Agar* that to say in general, that it was against and contrary to the form of the statute agreed, is not: but it must be particularly shewn that this agreement as the statute has declared void.

therefore admit the rule of law: but the question is the fact, whether this sufficiently appears on the record or not. In order to this it will be proper to take notice of the words of the statute which are insisted on, which it is that is set forth in the plea. The words of the statute (amongst others) are these; "If any person shall bargain or sell any office or deputation of any office or offices, or any part of them, or receive, have, or take any money reward or any other profit directly or indirectly, by promise, agreement covenant bond or assurance or have any money fee reward or other profit directly or indirectly for any office, or offices &c, with intent that any person should have exercise of any office or offices &c, which office or offices &c in anywise touch or concern the administration or government of justice, (and then it mentions several offices &c) all and every such bargains sales promises covenants and assurances as are before said shall be void." It is admitted that this office does concern the execution of justice: it is extended that it was agreed between the plaintiff and defendant that the bond in question should be given in consideration that the plaintiff and his son should surmount interest and estate in this office for the intent and

1740, 1. and purpose that the plaintiff should procure a grant of the same to be made to the defendant for his life; that this bond was accordingly given for the consideration aforesaid; that the plaintiff and his son surrendered their estate and interest in the office according to their agreement; that the office thereupon was granted to the defendant; and that such grant was made to him by the procurement of the plaintiff and according to the said corrupt agreement: and all this is confessed by the plaintiff's demurrer. If the office had been only surrendered by the plaintiff to the intent that the defendant might have the office, and the plea had said nothing more, it had been within the express words of the statute; and the case of *Sir A. Ingram* before mentioned, which goes no farther, is an express authority in point to this purpose. But the present case goes farther; and it is alleged also that the plaintiff was to procure a grant of the office to the defendant, and that he did procure it accordingly; so that I think there can be no doubt but he has brought his case within the express words of the statute.

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We are therefore all of opinion that neither of the objections taken by the plaintiff is of any weight, and that judgment must be given for the defendant (a)."

(a) See the case of *Layng v. Paine*, post, Trin. 18 & 19 Geo. 2. and the cases there referred to.

GEORGE JOHNSON against JOHN WILSON.

T. 14 & 15 THE opinion of the Court was thus delivered by

C. 2
Friday,
June 12th.

Several tenants in common, wishing to make partition of their

Willes, Lord Chief Justice. "Covenant. It comes on upon a motion in arrest of judgment after a verdict, and has been spoken to several times by *Burnett Serjt.* and *Draper Serjt.* for the plaintiff and *Bootle Serjt.* for the defendant.

land, covenanted by deed to pay their respective shares of the survey and allotments, and to abide by the award of certain arbitrators as to the allotments; the arbitrators allotted the land in fealty but did not direct any deeds of conveyance to be executed to vest the allotments in the respective owners;—held that for this defect the award was bad, and that no action could be maintained on the covenant for not performing the award, though the covenants were respectively liable on the covenant for non-payment of the expence of the survey &c. &c.

—No partition of land can now be made without deed.

—Where several persons covenant severally in respect of a joint interest, the covenant is joint notwithstanding the words cum quolibet eorum.

7 Mod. 345. oct. ed. 16 Vin. Abr. 221. pl. 8. not. S. C.

The

by the name of the *Marjo* and *Shook* or *Wary* in common and undivided to the loss and pre-
e owners thereof, and that for remedying the
enience the several owners thereof, to wit, the
defendant and twelve others therein named
that a partition and division should be made of
rt of the said undivided premises as the com-
or arbitrators in such deed named or the survi-
m should think fit; and also recites (inter alia)
veral owners had lately laid out several sums of
roportion to their several estates and interests
nd making a fence and bank for keeping out the
which bank was agreed to be supported and
the several owners of the said undivided pre-
portion to their respective estates and inter-
t was thereby covenanted and agreed between
rally, and not jointly, nor one for another or
s of another of them, but each and every of
is and their own acts only, that they would se-
mit stand to abide and perform such award or
gment for dividing &c. the said undivided piece
according to their respective interests as five
erein named or the survivors of them should
award, so as such award should be declared
writing indented under their hands and seals on
the first of *October* next ensuing the date of the
and that they would consent and agree unto
ery lawful and reasonable act matter and thing
the said arbitrators or the survivors of them
thought fit and necessary towards the perfecting

1741. owners in severalty, and that the said owners should pay their full and rateable parts and proportions of all such sums as had been expended or should be expended for or concerning surveying and allotting the premises or completing and confirming the said award or maintaining and defending the said division, all which sums should be paid from time to time into the hands of *Joseph Craggs Nicholas Johnson* and *George Johnson* (the plaintiffs) or some or one of them; and it was likewise agreed by the said deed that the said fence or sea bank lately erected should be by the said arbitrators confirmed to be repaired and kept up at the charges of the said respective owners and their heirs in proportion to their respective estates and interests in the said undivided premises; and for the performance of the covenants in the said deed they severally bound themselves their heirs &c. to each other in the penal sum of 300*l*.

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The declaration then set forth an award in writing indented, made by the arbitrators under their hands and seals on the 29th of *September* 1738, by which they allotted several parts of the said undivided piece of ground to the several owners thereof, and (inter alia) they allotted to the defendant *Joshua Whitehead* and *Isabel Weemes* their heirs and assigns in full satisfaction of their estates and interests in the said undivided premises twenty-two acres of ground, bounded as is described in the award and declaration; and these three are ordered by the said award to maintain in respect of their said allotment all that fence on the north side thereof dividing the same from the allotment of *Anne Holt*, and all that wall or fence dividing the same from the said old sea banks towards the east. By the said award there is allotted to *Thomas Lackenby*, another of the owners, five acres for his share, bounded as is therein described and situated without the said new fence or sea bank; and the arbitrators awarded that the said *Thomas Lackenby* his heirs and assigns should for ever afterwards be acquitted and discharged from all charges and reparations for or about the said new fence or sea bank, any agreement entered into to the contrary thereof in anywise notwithstanding; and that the said *Thomas Lackenby* should with all convenient speed hedge off his said allotment &c from the rest of the premises. And by the said award were allotted to the plaintiff. *George Johnson*, thirteen acres, bounded as is therein

herein described, in full satisfaction of his share of the said undivided premises. And the said arbitrators further awarded that the said new fence or sea bank should with all convenient speed be sufficiently repaired &c, and not only the charges and expences of working and finishing the same &c but likewise the charges and expences of repairing and maintaining the said new sea bank &c from time to time should for ever afterwards be paid and discharged by the said several parties to the said deed (other than and except the said *Thomas Lackenby* &c) according to their respective estates and interests, and that the reparation of the said bank &c from time to time should be left to the management and discretion of the said *Joseph Craggs Nicholas Johnson* and *Katherine Johnson*, three of the owners, and their heirs or any two of them. And the arbitrators ordered that the residue of the said common should from time to time be held and enjoyed in common by all the parties to the said deed (other than the said *Thomas Lackenby*) according to their respective estates and interests therein. And lastly they awarded that the said parties should from time to time on request made by the said *Joseph Craggs Nicholas Johnson* and the plaintiff, or some or one of them, well and truly pay and contribute their rateable and proportionable parts and shares of such sums of money costs and charges as had been expended or should thereafter be expended touching the surveying allotting and setting forth the premises, or managing completing and establishing the said award or defending and maintaining the said partition, into the hands of the said three persons or some or one of them.

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The plaintiff averred that he had well and truly observed and always been ready to perform the said award; and assigned three breaches in the defendant,

1st, That he and *Joshua Whitehead* and *Isabel Weemes* had not nor had any of them made any hedge or fence to divide the said twenty-two acres allotted to them, according to the form and effect of the said award, but had neglected so to do, contrary to the form and effect of the said covenant of the said defendant so made with the said plaintiff as aforesaid.

2dly, That soon after the making of the said award the three surveyors did repair and make the said new fence or sea

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sea bank, and the charges and expences of finishing the same amounted to a certain sum. to wit, to the sum of 84*l.* 6*s.*, whereof the defendant had notice and was requested by the said three surveyors *Joseph Craggs Nicholas Johnson* and *K. Johnson* to pay to them his share and proportion of the said charges &c. according to his estate and interest therein, but he did not pay the same to them or any of them according to the form and effect of the said award, but refused so to do, contrary to the form and effect of his covenant &c.

3dly, That divers sums, amounting in the whole to certain sum, to wit, 33*l.* 6*s.* 9*d.* were laid out and expended touching and concerning the surveying allotting and setting forth the premises and managing and completing the said award, of which the said *Joseph Craggs Nicholas Johnson* and the plaintiff gave notice to the defendant and requested him to pay them his rateable and proportionable share of the same, but he did not pay the same to them or any of them according to the form and effect of his said covenant &c, but neglected and refused so to do contrary to the form and effect of the covenant; and the said defendant, though often requested, had not kept his covenant with the plaintiff, but had denied and still did deny to keep the same, by which he said that he was injured and had damage to the value of 100*l.*

The defendant let judgment go by default, and a writ of inquiry was executed in *Northumberland*, where the action was brought; and the jury found damages for the plaintiff on the first breach 10*d.*, on the second 1*d.*, and on the third 1*d.*, and found 40*s.* costs.

It was insisted in arrest of judgment;

First, That the award was void, and that therefore the covenants to perform it must be void too;

Secondly, That the covenants were joint, and that therefore all the parties to the deed ought to have joined in the action.

As to the first; it was agreed by the Court that if the award were void the covenants to perform it were void too. As if a bond be entered into to perform the cove-
nant

ward be void or not. The objection to the
that it hath not directed by what deeds the par-
be completed, and therefore it is an imperfect
, which it has been answered that it is in itself a
partition, and that it sufficiently vests the estates
its in the respective parties without any farther
e; for which purpose were cited *Lit. Sect.*
Lit. 166, 169. But *Littleton* speaks only of
The other indeed relates to tenants in common,
plain in *fo.* 169, where the words are thus;
tion by joint tenants is not good without deed,
in common may make partition by parol, and
ecute the same by livery this is good and suffi-
w; and therefore where the books say that
ts may make partition without deed, it must be
f tenants in common and executed by livery.”
he goes on and shews a great difference between
nts tenants in common and copartners; so that
laid down as to the one do not hold as to the
This was before the statute 29 *Car.* 2. when a
might be by parol; and the livery, which is
l, supposes that a feoffment was intended, which
n have been a proper conveyance. And there-
nce the statute of 29 *Car.* 2. no conveyance can
deed, a proper conveyance is now become ne-
and for this reason the award is incomplete and

was said that an award may be good in part and
t (a) : and so to be sure. it may : but here the

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Secondly; as to the second objection that the covenant is joint, and that therefore the action ought to have been a joint action brought by all the parties to the deed, it is founded merely upon this mistake that the parties to the deed are joint tenants: in which case it has been always holden that though persons covenant severally yet if the estate or interest of the covenantors be joint the covenants will be joint notwithstanding the words cum quolibet eorum. For the wording of the covenants cannot make that, which was before joint (a), several; and it is so expressly holden in *Slingsby's* case, 5 Co. 18 b. 19 a; and in *Skin.* 401; *Comb.* 115; and 1 *Saund.* 153; so that this objection falls to the ground, the covenantors being undoubtedly tenants in common and not joint tenants, and the covenants being all several (b).

Besides the last breach is on a covenant merely collateral to the estate and the award; for the parties ought to pay the expence of the award in proportions, though no award or partition be made. And so it is like the case of *Northcote* and *Underhill*, *Salk.* 199 (c), where *Hob.* Ch. J. held that a distinct separate and independent covenant may be good, though the estate do not pass by the deed. Nor is this case liable to the objection in the case of *Coleman v. Sherwyn*, *Carth.* 97, that if several actions should be permitted the defendant might have damages recovered against him two or three times for the same thing. For here each man's part of the expences may be easily ascertained, and the plaintiff will recover damages for no more than he has been obliged to pay more than his share by the defendant's not paying his share; and by the smallness of the damages found it is plain that he has recovered no more.

(a) In *Manfell v. Burridge* and another, 7 *Durnf. & East* 351. where two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award, and the arbitrator awarded each of the two to pay a certain sum to the third, it was holden that they were jointly responsible for the sum awarded to be paid by each. If lessees covenant jointly and severally at the beginning of their covenants, all their subsequent covenants are joint as well as several, notwithstanding the intervention of covenants on the part of the lessor. *The Duke of Northumberland v. Errington*, 5 *Durnf. & East* 522.

(b) Where the covenant is joint and several, in an action against one only the breach may be assigned in the neglect of both. *Lilly v. Hedges*, 1 *Ser.* 551.

(c) 1 *Lord Raym.* 388. S. C.

But

it the doubt which stuck with me, and was the reason I gave no judgment when the case was put into the r, was that the plaintiff not having averred that he performed the covenants on his part it did not appear he had received any damage by the defendant's not ng paid his share of the expence, because it did not ar that he had paid any thing himself: but on consi- tion I think there is no weight in this objection.

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or these being mutual covenants. the rule is the same mutual promises, that the plaintiff need not aver that as performed his part, as he must have done if the had been expressly the consideration of the other (a). where it is not so, each may maintain an action for breach. And this difference is fully established and ed in the case of *Thorpe v. Thorpe*, 1 *Lutw.* 249, re a great many cases are cited for this purpose. as the defendant has let judgment go by default, and jury have found some damages, it must be taken for ted now that the plaintiff has received damage by the ndant's not paying his share of these expences. e judgment must be arrested as to the two first ns (b), and judgment for the plaintiff on the third (c).

Vid. not. to *Acherley v. Vernon*, *sup.* 157.

Breaches; there was only one count.

Mr. J. Fortescue A. was absent, but he concurred in the above opinion.

FRY KARVER, Executor of B. KARVER, against THOMAS JAMES (a)

Tria. 14 &
15 Geo. 2.
Friday,
June 12th.

[HIS was an action upon promises made by the de- In pleading
lunt to the plaintiff's testator; to which the defendant a writ sued
ided first the general issue, and secondly that the se- out within
fix years
after the

of action arose, in order to save the statute of limitations, it is necessary to alledge that sit was returned.

Indag that the party sued out a capias, without an original, is sufficient for this purpose. Even though the capias be returnable on a common return-day, and not on a day certain; the writ is only voidable, not void.

Bull. N. P. 150, 1.; and 7 *Med.* 348 oct. ed S. C.; by the name of *r v. James* in the former and *Karver v. James* in the latter.

veral

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 not accrue within six years next before the suing out of
 the original writ &c.

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The plaintiff replied that his testator who was one of the attornies of this court, on the 26th of *April* in *Easter* term, 5 *Geo.* 2., sued out a writ of privilege against the defendant to answer him in a plea of trespass on the case on the morrow of the *Holy Trinity* then next, but that the sheriff of *Herefordshire* (to whom it was directed) did nothing thereupon, nor did he send back the said writ; therefore the plaintiff's testator sued out another writ &c, returnable in the then next *Michaelmas* term &c; and so on twenty other writs of the same kind, stating them and the days when they were returnable, but it stated that neither of them had been returned by the sheriff, and it did not state that any one of them had ever been delivered to him; that before the return of the last writ namely on the 28th of *July* 1737 *B. Karver* (the plaintiff's testator) died; recently after whose death the plaintiff sued out the writ (a *capias*) in this case in *Trinity* term, 11 & 12 *Geo.* 2., for recovering the damages by reason of not performing the several promises in the declaration mentioned; that the several writs of privilege so prosecuted by *B. Karver* in his lifetime against the defendant were prosecuted by him with an intent to have impleaded the defendant of and upon the several promises in the declaration specified; and that the writ so prosecuted by the plaintiff against the defendant was prosecuted against him with intent to implead him for the causes of action in the declaration specified and upon his appearance to declare against him for the said several causes of action, and that he (the plaintiff) according to his said intention afterwards on &c declared against the defendant here &c; with an averment that the several causes of action accrued within six years next before the suing out of the writ of privilege first above specified by *B. Karver* &c.

To this replication the defendant demurred specially, and shewed for cause of demurrer that the writ of privilege first above specified was void for want of a sufficient return &c.

This case was argued on the 10th of *May* 1740 by *Booth* Serjt. for the defendant, and *Burnett* Serjt. for the plaintiff and

the opinion of the Court was now delivered, as follows, by

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Tilley, Lord Ch. J.—“ There is but one cause of error assigned, but four objections have been taken to the bar.

1. That the first writ is not good, because it is returnable on a common return-day, whereas it ought to be returnable on a day certain; so all the continuances fall to ground.

2. That the first writ was never returned, so all the continuances fall for the same reason.

3. That the capias is not sufficient; that the reply ought to have set forth an original.

4. That it does not appear that the plaintiff took the capias as executor, and so this is not within the act of the stat. 21 Jac. 1. c. 16. s. 4. (a).

We are all of opinion that the plaintiff cannot have judgment, though not for the same reasons; and therefore we all begin with the third objection first, in which we are agreed.

1. We are all agreed that the capias is sufficient, without setting forth the original; it being now the con-

By that clause it is enacted that if judgment be given for the plaintiff and be reversed, or the judgment be arrested, or if the defendant be outlawed or the outlawry be reversed, “ in all such cases the party plaintiff his heirs executors or administrators, as the case shall require, may commence a new action at any time within a year after such judgment reversed or such writ given against the plaintiff or outlawry reversed, and not after.” But in the equity of that section the courts have allowed an executor or administrator within a year after the testator's or intestate's death to renew a suit commenced by the testator or intestate, 1 Lutw. 260; Wilcox v. Huggins, Fitzg. 290; 2 Str. 906. And in Lethbridge v. Chapman, 15 Vin. Abr. 103. cited in Wilcox v. Huggins, that indulgence was extended to fourteen months after the intestate's death. So if there be any delay in granting administration on account of any suit respecting the will, the time may be extended, 1 Bramp. 906. No precise time indeed appears to have been fixed: but in Lee J. said “ I think it should be in nature of journeys accounts, which taking up and pursuing of the old action in a reasonable time, which is to be called by the discretion of the justices, 6 Co. Spencer's case. And by the same I think what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the Court from the circumstances of the case: it is generally the year in the statute is a good direction.”—Where an act of parliament for dividing and allotting lands directed all disputed claims to be tried by a single issue, and limited the time for bringing such actions to six months, it is held that an action brought within the time but which abated by the death of the defendant must be revived against the heir within six months afterwards. 10 Mod. 141. Bate, Corp. 738.

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stant course of the Court to take out a capias without an original. That a latitat is sufficient has been several times determined in the King's Bench. It was so expressly holden in *Culliford v. Blandford* (a), *Carth.* 233, 4, and *Dacy v. Clinch*, 1 *Sid.* 53,; and in the case of *Hollister v. Coulson*, P. 9 *Geo.* 2. no where reported (b). And yet that is not the first process; for a latitat as much presupposes a bill of *Middlesex* as a capias presupposes an original. And according to the reason of these cases it was expressly adjudged in this court 3 *Geo.* 2. in *Lethbridge* administrator of *Richards v. Chapman* and wife that a capias in this court was sufficient, without setting out the original; a case exactly parallel to this, but not to be found on the rolls, it not having been brought in.

4thly, In this likewise we agree that the capias was taken out by him as executor. It is said in the beginning of the declaration that the plaintiff brings this action of executor; and then it is said that the said *H. Karver* took out a capias; and it is alleged that the capias was the process in this suit, in which the defendant appeared and on which the plaintiff declared.

1st, As to the first point Mr. J. Fortescue A. is of opinion that, this process being erroneous, all the continuances founded upon it are void. But we three (c) are of opinion that it is only voidable, and not void; and that therefore if it had been returned, it would have supported the continuances. That it is voidable, and not void, and that the sheriff is obliged to return it, was holden in *Poph.* 205,; and that is a stronger case than this, because there the capias was returnable on a *non juridicus*, namely, on *All-Souls-Day*. If therefore the sheriff had returned this writ, we think it had been well enough.

2dly, As to the second objection: Mr. J. Fortescue A. is of opinion that the writ need not be returned; and to be sure it was so adjudged in this court in the case of *Kinsley v. Heyward*, reported in 1 *Lutw.* 256 and 257. But even there Mr. J. *Blencowe* was of another opinion.

(a) The judgment in which case was affirmed in the Exchequer-Chamber, error brought; 1 *Lord Raym.* 78.

(b) Since reported in 1 *Str.* 550.

(c) *Willes* Ld., Ch. J.; Mr. J. *IV. Fortescue*; and Mr. J. *Parker*.

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the reason on which the other Judges went was that did not appear in that case whether the first writ were turned or not; they said they would intend that it was turned unless the contrary were shewn on the other side. But that cannot be intended in the present case, cause it is not even alleged that the writ was ever delivered to the sheriff, and it is expressly alleged that the writ never returned it. And even this resolution of this court though founded on stronger circumstances than appears in the present case was afterwards reversed in the court of King's Bench, where it was expressly holden that the plaintiff ought to plead that he had delivered the writ to the sheriff, and that it was returned (a); and judgment was affirmed in the House of Lords on the 10th of May 1702. There is also another case exactly to the same purpose in 1 *Lutw.* 279, 280, *Brereton & Ux. v. Kaye*; where the same judgment was given in *B. R.* and (as it is said) for the same reasons as in the case of *Kinsey v. Hayward*. These cases seem to be decided on the reasons given, and the rules laid down, in *Waller's case* 6 *Co.* 10., which though laid down in relation to journeys accompts yet hold equally strong in the present case. And it appears by the case of *Green v. St. B. R.* 13 *An. Salk.* 421, which is after both cases that the method now is to return non est in answer on the first writ, and then to continue (c) the rest vicecomes non misit breve.

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As

See also *Brown v. Babington*, 2 *Ld. Raym.* 883; *Atwood v. Burr.* 7 *Ad.*; and *Harris v. Woolford*, 6 *D. & E.* 617. But where an action must be brought within three months, it is sufficient for the plaintiff to prove a latitat within the time and his declaration within a year afterwards, without the writ returned. *Parsons v. King*, 7 *D. & E.* 6.

Reversing the judgment given in *C. B.*

In *Brown v. Babington*, 2 *Ld. Raym.* 880. it was holden (contrary to the opinion of Mr. J. Powell) that an action of assumpsit could not be considered as a new action of an action commenced by a writ of *clausum fregit* sued out within six months to prevent the statute of limitations attaching. So in *Smith one &c v. one &c*, 3 *D. & E.* 662. it was ruled that an attachment of privilege could be pleaded as a continuation of an action commenced by the same writ by a bill of *Middlesex*, to avoid the statute of limitations. But in *Middleton v. Forbes*, it was decided that an action by original writ by an administratrix within six years after the cause of action would enable the administratrix and her husband (whom she afterwards married) to recover in an action by bill by both, notwithstanding a plea of the statute of limitations. "Broderick Lord viscount Middleton v. Forbes and Error in the Exchequer-Chamber. On the pleadings the case was this: that *Eliza* his wife, administratrix of *John Couchmaker* her late husband, their bill in the King's Bench against the defendant (the plaintiff in error) was laid out by the intellatc. The defendant pleaded non assumpsit; and

For it is strange to me how a writ can be continued when it was never returned. And besides it would be great inconvenience if a plaintiff might sue out a writ, and keep it in his pocket for six years together, of which the defendant could not possibly have any notice, and then come out in this manner and continue it down, to avoid the operation of limitations.

But we are all, though for different reasons, of opinion that judgment must be for the defendant (a).

non assumpsit infra sex annos. The plaintiffs replied that *Eliza*, who was first on the 2d of *January* 18 *Geo.* 2. brought her original writ, and before she married *Forbes*, and they recently afterwards 14th *January* 1751 exhibited their bill against the defendant. The defendant rejoined that he married *T. Jekyll*, who was alive on the 5th of *June*, the time of issuing the original. The plaintiffs surrejoined, and tendered an issue; to which the defendant demurred.

Upon judgment given for the plaintiff in the King's Bench (1) with judgment, a writ of error was brought in the Exchequer-Chamber; where *Ford* for the plaintiff in error argued that the suit was abated by mistake, a voluntary act of the party. That the stat. 21 *Jac.* 1. c. 16. s. 4. which gives peace for the security of property, and ought not to be extended by construction to a writ of error. 1 *Lew.* 31. 1 *Lutw.* 261; 6 *Co.* 9, 10. Besides a suit commenced by bill cannot be continued by original.

For the defendants in error, it was insisted that there was no discontinuance. That the new suit was brought within a reasonable time, namely within a year, whereas it has been holden that a year is a reasonable time. *v. Kinsley*, 1 *Lutw.* 256; 1 *Ld. Raym.* 432; 2 *Inst.* 476. That the operation of limitations ought not to receive a literal but an equitable construction. *Saund.* 120; 2 *Mod.* 71; and 1 *Lew.* 31. As to the commencement of the suit by original and the suit afterwards by bill, the reason for it is evident: the defendant was in custody of the marshal, and being in such custody

PERCEVALL HUTCHINSON *against* WILLIAM STURGES.

[H. 14 Geo. II. Rol. 444.]

1741.
T. 14 & 15
G. 2.
Friday,
June 12th.

DEBT on a bond for 8*l.* given by the defendant to the plaintiff, one of the bearers of the virges of the King's household, and an officer and minister of the King's household at *Westminster*; dated the 25th of 1740.

The defendant pleaded that the plaintiff was indebted to the defendant in 10*l.* for work and labour &c, in 10*l.* for goods sold and delivered &c, and in 5*l.* for money lent and received &c, amounting in the whole to the sum of 25*l.*, which exceeds the debt of the plaintiff, and that the defendant offered to set off &c according to the law &c.

The plaintiff prayed that the condition of the bond should be enrolled, and then demurred to the defendant's plea.

The condition of the bond was for the appearance of *Daniel* before the Judges of the King's Court of his Bench at *Westminster* at the next Court of the King of his Bench to be holden at at *Southwark* in the county of *Surry* on Friday the 25th of *July* to answer *T. Squier* in a plea of trespass on the case, to his damage of 99*s.*

This case was argued on the 7th of *February* 1740 by *le Serjt.* for the plaintiff, and *Agar Serjt.* for the defendant; and now the opinion of the Court was given as follows, by

Tilles Lord Chief Justice. "The question is whether these debts which the defendant sets forth in his plea can be set off against the plaintiff's demand. There are two statutes (a) in relation to this matter; and it will be proper to consider under which statute this falls, and what the determinations have already been in the construction of them.

The words of the first statute, which is the 2 Geo. 2. c. 11., are "where there are mutual debts between

Under the stat. 8 G. 2. c. 24. no debt on bond can be set off, unless it be on a bond for securing the payment of money. —Consequently a bail-bond cannot be set off under that act. —Nor can such a bond (given to an officer of the palace court) be set off under the stat. 2 G. 2 c. 22. to an action brought against that officer on a simple contract. —But a bail-bond assigned over by sheriff to the party may be set off to an action brought by that party; though in such case the penalty of the bond will be considered as the debt. Bull. N. P. 179. S. C.

(a) See 2 Burr. 824; 1024, 5; 1230; and 4 Burr. 2221.

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the plaintiff and the defendant, or if either party sue or be sued as executor or administrator where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence on the general issue or pleaded in bar as the nature of the case shall require ;” and intended to be given in evidence, notice shall be given &c. Upon the construction of this statute several questions arose before the making of the stat. 8 Geo. 2. c. 24

1st, Whether debts on simple contract could be set off in common cases against a debt on specialty ;

2dly, If in common cases, whether they could when an executor or administrator is plaintiff ;

And 3dly, Whether in the case of a bond the penalty was to be considered as the debt &c.

In *Kemys v. Betson* (a) Tr. 6 Geo. 2. in B. C. it was holden in the case of an executor that simple contract debts cannot be set off against debts on specialties, so that the debts must be of an equal nature ; otherwise such a construction might occasion a devastation. I should have been of the same opinion before the stat. 8 Geo. 2., but not for the same reason. For if a statute orders it to be so, it will justify the executor, and it will be no devastation in him ; and of this opinion was Lord Hardwick in the case of *Brown v. Holyoak*, which I shall mention by and by. The true reason is that this was only submitted in the room of an action, to prevent circuity or a bill in equity. It was therefore held that you cannot set off a debt barred by the statute of limitations, because you cannot recover it by action. This judgment was never reversed. And in the case of *Joy v. Roberts* in the Exchequer M. 6 Geo. 2. there was the same resolution. But in the case of *Stephens v. Lestyn* (b) M. 6 Geo. 3. this court carried it farther, and held in the case of an action upon a bond between common persons a debt upon simple contract which was pleaded could not be set off going upon this reason that there ought to be the same construction on every part of the act : but in this I think they were mistaken ; for where the cases are different the construction ought to be different too. And of this opinion were the Court of King’s Bench, when it came

(a) 8 Vin. Abr. 561 pl. 30.

(b) 8 Vin. Abr. 562. pl. 31.

before

on a writ of error, (a), and would have reversed judgment but for another objection, the debt being less than the penalty though more than the debt by the condition; and this being a case before 8 Geo. 2. they held, and I think very rightly, that the penalty must be considered as the debt.— In the case of *Brown v. Holyoak* (b) P. 8 Geo. 2. on a writ of error out of this court, the Court of King's Bench reversed the judgment of this Court which had affirmed that a debt on simple contract could not be set off against a debt due for rent; and I think that the judgment was rightly reversed for the reasons I have mentioned. In that case Lord Hardwicke said it would work a devastation, and seemed a little to doubt it should be in the case of executors. But his doubt was removed by the statute 8 Geo. 2. c. 24. passing just at

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against
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By that statute it is enacted that mutual debts shall be set off against each other either by being pleaded or proved in evidence on the general issue, though such debts are in law to be of a different nature, unless in the case either of the said debts shall accrue by reason of a penalty in the bond &c. in which case the debt to be set off shall be pleaded in bar, in which case it shall be shewn how much (c) is truly and justly due on the one side; and in case the plaintiff recovers, judgment shall be entered for no more than is truly and justly due to the plaintiff after one debt is so set off against the other. This statute has solved all the difficulties before mentioned.

this is not a bond with condition for the payment of money, we are all of opinion that the case is not within the statute, but must stand on the stat. 2 Geo. 2. For we are all of opinion that the debts pleaded cannot be set off in this case, this being a bail-bond, and the plaintiff recovering in his own right but in the nature of a trustee for the defendant. If this were otherwise, all bail-bonds might be set off. But it might be as well said that when a defendant is an executor the defendant may set off a debt due

See *W. Kel.* 139; 2 *Barnard.* 338; and 8 *Vin. Abr.* 562. pl. 33. and 179. 8 *Vin. Abr.* 562. pl. 32, and 35; and *Bull. N. P.* 179. Defendant in pleading a set-off, to debt on bond, must set out the value on the bond; and that averment is traversable. *Symonds v. Symonds* 10 E. 65; even though laid under a videlicet, *Grimwood v. Grimwood* 10 E. 460.

from

1741. from the plaintiff to the defendant in his own right, (a) as that the defendant can set off in the present case; and yet that is contrary not only to common sense but also to the plain words of the statute. If indeed this had been a bond to the sheriff assigned over to the party according to the statute, we should have thought otherwise, and that the penalty must be considered as the debt, this not being a case within the statute 8 Geo. 2. But the bond here being sued by the officer himself, we are all of opinion that the debt due from the officer cannot be set off, and that judgment must be for the plaintiff."

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SON
against
STURGES.

(a) Nor, when an executor sues for a cause of action arising after the testator's death, can the defendant set off a debt due to him from the testator. *Shipman v. Thompson*, T. 11 & 12 Geo. 2. C. B. sup. 103; and *Tegelmeyer and another, executors, v. Lumley*, T. 25 G. 3. B. R. The latter was an actual covenant for rent, part of which became due in the testator's lifetime, and part since his death. The defendant, at the trial, before Lord Mansfield at the sittings after Easter term 25 G. 3., set off a debt due from the testator to him, and the plaintiffs were non-suited.

Erskine moved for a new trial, on the ground that this could not be set off, and cited *Rydeut assignee v. Brough*, Cowp. 133. *Shipman v. Thompson* (1) Bull. N. P. 180, and *Kilvington executor v. Stevenson*, which he read from a note of Mr. Justice Yates. "Assumpsit as executor for goods of his testator. There were two pleas; 1st, non assumpsit; 2dly, a set-off for a debt due from the testator to the defendant. To this the plaintiff demurred. And *Welles*, in support of the demurrer, insisted that the plea was bad, and that the defendant could not set off a debt owing to him by the testator in satisfaction of the present demand, as that would be altering the course of distribution, and he might by that mean be paid before creditors of a superior nature. Mr. Solicitor-General, who was to have argued on the other side, mentioned the stat. 2 G. 2. c. 28. §. 13. *Per Curiam*. The plea is clearly bad. This is not an action for goods that were in his hands at the testator's death, in which case he might set off; but for goods he has taken possession of since his death, in which case to allow the set-off would be altering the course of distribution. Judgment for the plaintiff."

Casper shewed cause against the rule; here the executors unite both their demands; and this case differs from those cited. The balance only ought to be paid. And as to the inconvenience of altering the course of administration, the executors have put themselves in this situation.

Erskine, who was going to argue in support of the rule, was stopped by Lord Mansfield Ch. J., who said he was satisfied on the point, on the authority of the case of *Kilvington v. Stevenson*.

Rule absolute.

1741.

WILLIAM WARD *against* WILLIAM CRESWELL. T. 14 & 15
G. 2.

TO replevin for taking six boat oars at *Creswell Haven* otherwise *Creswell Boat Landing* in the parish of *Woodborn*;

here was an avowry that the locus in quo was the foil freehold of the defendant, and that the goods were damaged there &c.

the plaintiff pleaded in bar, first, that *E. Cook* was seized in fee of one moiety of the place in which &c, and he gave the plaintiff license to lay and place the goods there, traversing that the locus in quo was the foil and freehold of the defendant: on which issue was taken and decided for the defendant,

Monday,
June 15th.
The right of
fishing in the
sea is a right
common to
all the King's
subjects;
and there-
fore a pre-
scription for
such a right
as annexed to
certain tene-
ments is bad.
16 Vin. Abr.
354. S. C.

secondly, That the locus in quo for time immemorial has been a certain piece of waste ground in the township of *Creswell* and parish of *Woodborn* containing three acres of land contiguous to the sea, and that *E. Cook* was seized in fee of "certain ancient tenements consisting of divers messuages and several to wit 200 acres of land with the appurtenances," and that he and all those whose estate was in the said tenements with the appurtenances have for time immemorial had and been accustomed to have themselves and their farmers and servants common fishery with *two boats* in the sea there every year at seasonable times of fishing in the year as belonging and appertaining to the said tenements with the appurtenances, and to have for themselves their farmers and servants the liberty of landing and putting on shore their said fishing-boats on the place in which &c for the necessary use of the said common of fishery; that the plaintiff as the servant of *E. Cook* and by his command at the time of fishing &c. being a seasonable time of fishing, with a boat landed in the sea there, using the said common of fishery there, and on that occasion at the same time of taking the boat landed and put on shore the said fishing boat in and on the place in which &c, the said six boat oars then lying in the said boat and part of the tackle and furniture were &c, whereupon the defendant of his own wrong took the said boat oars &c.

There

1741. There was a third plea in bar, similar to the second, except that instead of claiming the right of fishery with two boats the right was claimed generally "with their boats."

WARD
against
CREWELL

To the two last pleas there were general demurrers.

After two arguments at the bar, the first by *Droper* Serjt. for the defendant and *Bootle* Serjt. for the plaintiff on the 21st of *November* 1738, and the other by *Buratt* Serjt. for the former and *Prime* King's Serjt. for the latter on the 16th of *June* 1740, the judgment of the Court was delivered, as follows, by

Wilkes, Lord Chief Justice. "It was said by the counsel for the defendant, and not contradicted by the counsel for the plaintiff, that there has been a verdict for the defendant on the first plea; so it comes before the Court only upon the demurrer to the second and third pleas.

To the second plea it was objected.

First, That the prescription was too general and uncertain, being laid to be appurtenant to "certain ancient tenements consisting of divers messuages and several to wit, two hundred acres of land."

Secondly, That the prescription was void, because the plaintiff insists on his right as a particular right of common appurtenant to certain tenements, whereas it is a general right for every subject of *England* to fish in the sea of common right.

Thirdly, That the plaintiff had not brought his case within the prescription; he not having averred that the boat in question was necessary for the enjoyment of his common of fishery, or that it was necessary for that purpose to land it on the place in question.

To the third plea the same objections were taken and two more,

First, That the prescription was not laid for any certain number of boats, and therefore void.

Secondly, That the prescription is to fish with their boats, and that the plaintiff has not said whose the boat in question was,

We

We think that there is something in most of these objections: but as we are all clearly of opinion that the second objection, which goes to both pleas, is unanswerable, shall say the less upon the rest.

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against
CRESSWELL.

The first objection likewise goes to both pleas. It consists of two parts; it is objected 1st, That "tenements" is too general a word; and 2dly, That the prescription is only claimed in respect of *certain* ancient tenements &c, without saying how many, or whether it be limited for all or for each of them, and it cannot be limited jointly for several. It is said that the word "tenements" is too uncertain, unless ascertained by other words, as the messuage or tenement called *The Black Swan* &c: but we do not rely upon that. The other part of this objection seems to be fatal. In *Basket v. Lord Mordant*, *Dyer* 164. a., and *Bendl.* 74., it was held that if a man, having common in a waste for one hundred sheep as appurtenant to a house and certain acres of land, purchase another messuage with certain lands which also has common in the same waste for other one hundred sheep as appurtenant, he cannot make title in leading by prescription in the entire for common appurtenant to both houses and lands together for two hundred sheep, but must make two several titles and prescriptions for the two hundred sheep. The same doctrine is laid down in *Palmer* 362.

The third objection which also applies to both the pleas, seems to be fatal. We think it is sufficiently set forth that the boat was necessary for fishing, but it is not sufficiently shewn that it was necessary to land it on the decedant's land (a).

The first objection to the third plea appears to have but little weight; for if a man have a right to fish, he may fish with as many boats as he pleases.

But the second objection to the third plea seems to be of weight, that the plaintiff should have shewn that it was a boat of *E. Cook* or his farmer or servant; the prescription confining it to *their boats* in this plea.

(a) See *Peppin v. Shakespear*, 6 Durnf. & East 648.

But

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against
CARSWELL.

But we are all clearly of opinion on the second objection, which equally applies to both pleas, that the prescription is void, because the right claimed as annexed to certain tenements is a general right for all the subjects of the kingdom (a). In *Pell v. Towers*, Noy 20, it was agreed "that a man shall not prescribe in that which the law of common right gives." So in *Bro. Abr. tit. "prescription" pl. 71*. Now "every man may fish in the sea of common right," 8 *Edw. 4. 19. a.* In *Warren v. Matthews*, 6 *Mod. 63*, and *Salk. 357*, it was holden that "every subject of common right may fish with lawful nets in a navigable river as well as in the sea." So is 1 *Mod. 105*. And this is not merely the law of this country, but is also the law of nations. *Grot. de Jur. Belli et Pacis, b. 2. c. 3. f. 9.* And *Bracton, l. 1. c. 12. f. 6.* says *Publica vero sunt omnia flumina et portus: Ideoque jus piscandi omnibus commune est in portu et in fluminibus.* This prescription therefore for a right common to all the subjects of the realm cannot be supported. A man might as well prescribe that he and all those whose estate he has have a right to travel on the King's highway as appurtenant to his estate,

For these reasons, as the defendant has had a verdict for him on the first plea, and as we are of opinion that the plaintiffs second and third pleas in bar are both bad, judgment must be for the defendant."

(a) See *Carter v. Murcot*, 4 *Burr. 2163*; and the *Mayor &c of Lynn v. Turner*, 4 *D. & E. 437*, and 2 *H. Bl. Rep. 182*.

Trin. 14 &
15 Geo. 2.
Wednesday
June 17th.

BRADFORD against BRYAN.

The parties
having sub-
mitted all
matters in
difference to
arbitration,
the arbitrator
determined
all matters

DEBT on a bond for 50*l.* dated 30th July 1739.

The defendant cravedoyer of the bond and condition, by which it appeared that the bond was given for the performance of an award to be made by *E. Esq.* way of and concerning all actions suits &c. and (except one) and gave liberty to one of the parties to prosecute that matter if he chose; the award was holden bad in toto.

7 *Mod. 349.* oct. ed. S. C.

demand

demands whatsoever between the said parties so as the award should be made on or before the 8th of *August* 1741. 1739; and then he pleaded that the arbitrator did not make any award on or before the 8th of *August*. BRADFORD
against
BRYAN.

The plaintiff replied that the arbitrator made his award on the 8th of *August* 1739, in which the arbitrator awarded that all suits commenced or depending by or between the said parties at any time before the 30th of *July* should cease; that the defendant should on or before the 23d of *October* then next pay to the plaintiff 14*l.* 16*s.* 6*d.* full of all demands, and that the plaintiff should on or before the said 23d of *October* pay to the defendant 16*s.* 6*d.* for all tithes and *Easter* duties whatsoever ("except the tithes of calves, if the same were tithable, and which the arbitrator excepted out of his award, it being agreed by the defendant by writing under his hand and proved before the arbitrator that the same should remain until an agreement were made with the rest of the parishioners whether the same ought to be paid or not") due to him as rector of the parish of *Cliff St. Mary* to the 30th of *July*; and that the plaintiff and defendant on receipt of the said several sums of 14*l.* 16*s.* 6*d.* and 16*s.* 6*d.* should execute general releases, the one to the other, of all demands whatsoever ("except the said tithes of calves, for which the defendant was at liberty to prosecute if he thought fit.") The replication then assigned a breach, in the non-payment of the 14*l.* 16*s.* 6*d.* by the defendant to the plaintiff on or before the 23d of *October*.

The defendant, after protesting that it was not agreed by him &c. that the tithes of calves, or the dispute or question between him and the plaintiff relating thereto, should be excepted out of the award, demurred generally to the replication. And the plaintiff joined in demurrer.

After argument by *Burnett* Serjt. in support of the demurrer and *Agar* Serjt. contra on the 20th of *June* 1740, the opinion of the Court (except that of Mr. *J. Fortescue* who was absent, and who doubted,) was now given to the following effect by

Willes, Lord Chief Justice. There is but one question in this case whether the award be good or not. And only

1741: only one objection has been taken to it, that though every thing was submitted to arbitration, yet that award does not determine all matters in dispute between the parties, because the tithes of calves are excepted and the defendant is at liberty to go to law for them if he thinks fit.

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against
BRYAN.

The rule is that where all matters are submitted to arbitration, the submission is conditional, all matters must be determined, otherwise the award is void, and it cannot be good in part and bad in part; as where all matters are submitted, and the words *so as* or *so that the award be made of the premises on (a) or before such a day*. It is so holden in *Cro. Eliz.* 838, 9. *Risden v. Inglet*; 1 Jac. 200. *Middleton v. Weeks*. It is only said there that the arbitrators need make an award only of such matters in dispute of which they had notice (b): but that distinction will not help the present case. *Ormelade v. Cro. Jac.* 355; *Cockson v. Ogle*, 1 *Lutw.* 550, 551 and in many other books: and it is now settled law. *Cro. Eliz.* it is said that the words, *so as the same award be made*, without *de præmissis*; and in 1 *Lutw.* *so as said award be made*; the very same words as here. I am willing to carry it as far as it has been carried already, because were it not for the cases I should be of opinion that when all matters are submitted, though without such condition, all matters must be determined because it was plainly not the intent of the parties that some matters only should be determined, that they should be left at liberty to go to law.

(a) The submission to an award was on condition that the award was made *on or before* the first day of *Michaelmas* term; the time was afterwards enlarged till the first day of *Hilary* term; the award was made *on* the first day of *Hilary* term, and held good, the word "till" being for that purpose inclusive.

v. Simmonds, 3 *Bro. Ch. Caf.* 358.—But no action can be maintained on an arbitration-bond, if the award be made after the time limited in the bond, though within the time afterwards enlarged by the consent of both parties. *Bro. Goodman*, *E.* 29 *Geo.* 3. *H. R.* referred to in 3 *Durnf. & East* 592. *n. b.*

(b) And therefore an award, made upon a reference of "all matters in difference between the parties," does not preclude one of the parties from bringing upon a cause of action subsisting at the time of the reference, if such cause was not laid before the arbitrator. *Ravie v. Farmer*, 4 *D. & E.* 146. *Golightly v. Jellicoe*, there referred to.—If an arbitrator, under a general reference of "all actions, controversies, and suits," recite in his award only the suit between the parties, and determine that one, the award is good, because it will not be intended that there was any other. *Hawkins v. Colclough*, 1 *W. & A.* 277.

the rest. Here the tithes of calves are excepted in the award, and therefore the award is void.

1741.

Judgment for the defendant.

BRADFORD
against
BRYAN.

MERITON *against* STEVENS.

M. 15 Geo. 2
Tuesday,
Nov. 10th.
A writ of error is not a superseas till allowance or notice of it.

“SKINNER Serjt. and Draper Serjt. shewed cause against a rule nisi for setting aside a fieri facias taken out upon a final judgment, after interlocutory judgment and a writ of inquiry executed.

—And if the sheriff has lo-
vied under
a fi. fa. after
the issuing,
but before
the allow-
ance of a
writ of error,
he must pro-
ceed to sell
the goods.
Barnes 205.
S. C.

The case was thus ; A writ of error upon this judgment was sealed before twelve o'clock in the morning, afterwards a fieri facias was sued out and executed by the sheriff about five o'clock in the afternoon. The writ of error was brought to the clerk of the errors and allowed about eight o'clock in the evening, and about the same time notice thereof was given to the plaintiff or his attorney.

They cited a case in 1 *Salk.* 321., in which it is said that a writ of error is a superseas only from the time of the allowance ; and the case of *Miller v. Miller (a)* in *Michaelmas* 1727, in which (they said) it was determined that a writ of error being allowed before the execution executed the execution was irregular, but that notwithstanding even in that case the sheriff might proceed to sell the goods if taken. They relied also upon the order of this Court made *Michaelmas* 28 *Car.* 2., by which it is expressly ordered that no writ of error shall be a superseas until it is brought to the clerk of the error and allowed by him. And they insisted that the reason of the thing likewise was with them ; for if a writ of error were a superseas from the time of the sealing and before allowance or notice a defendant might keep one in his pocket until the execution was completed, the goods sold, and the money paid to the plaintiff, and then set it all aside as irregular, which would be very inconvenient and unjust.

Wynne Serjt., for making the rule absolute, insisted that the writ of error was a superseas from the sealing, and

(a) *Sir G. C. PraB.* 39.

1741. for that purpose cited two cases in *Cro. Jac.* 342, and 535; *Godb.* 439; 1 *Ventr.* 30; 3 *Lev.* 312; 3 *Keb.* 309; and the case of *Gurnell v. Fawl* (a) *Tr. 2 Geo. 2.*, where he said it was determined that a writ of error is a superſedeas from the time of the ſealing, though there can be no contempt in the ſheriff until notice. And he ſaid that the ſame was agreed to be law in the caſe of *Smith v. Horner* (b) *M 4 Geo. 2. B. R.* He likewiſe cited the caſe of *Spinks v. Bird* (c) in this court, *P. 10 G. 2.* But he admitted that, if the ſheriff had taken the goods before the ſealing of the writ, he might have proceeded to the ſale of them afterwards.

MERRISON
againſt
STEEVEN.

Mr. J. *Forteſcue A.* ſaid that it was always holden to be a ſuperſedeas from the ſealing, and that it had been frequently adjudged in *B. R.* and in this court.

Mr. J. *Parker* ſaid that he believed that it had been ſo holden, but that he always thought that it was wrong; and that the true rule was that it ſhould ſtay proceedings from the time of the allowance, but that neither the ſheriff or the party ſhould be in contempt until actual notice.

Mr. J. *Burnett* was of the ſame opinion, and ſaid that it could not ſtay proceedings in this court (being a writ iſſuing out of another court) until it was delivered into this court or to the proper officer of it.

I was of the ſame opinion as my Brothers *Parker* and *Burnett*, but took time to conſider of it, and to look into the caſes."

(On the 28th of *November* this caſe was determined.)

"I this day, delivered the opinion of the Court (abſent Mr. J. *Forteſcue A.*) who differed from us, and adhered ſtrenuouſly to the opinion that he had given before, and gave me ſeveral caſes to ſupport his opinion that a writ of error was a ſuperſedeas from the time of the ſealing; but none of his caſes (except one which I ſhall take notice of by and by and of which I can find

(a) *Vid. 1 Barnar J.* 176.

(b) *Ib.* 371.

(c) *Peſſ.* note.

support) when they came to be looked into at all warranted this notion. I therefore gave our opinions in the following manner—

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MERRITON
against
STEVENS.

Upon the case as before stated two questions arise ;

First, From what time a writ of error is a superſedeas ; either from the time of ſealing or only from the time it's allowance ;

Secondly, How far an execution taken out regularly before a writ of error allowed ſhall be ſtayed by a writ of error allowed afterwards.

If a writ of error be a ſuperſedeas from the time of the ſealing, then the ſecond queſtion will not ariſe in the preſent caſe, becauſe it is admitted that the writ of error was allowed before the execution was taken out, though not allowed till afterwards. But if we ſhould be of opinion (as we are) that a writ of error is not a ſuperſedeas until it is brought to the clerk of the errors and allowed, then the ſecond queſtion will ariſe.

As to the firſt queſtion ; I have looked into all the caſes that were cited to ſupport the notion that a writ of error is ſuperſedeas from the time of the ſealing, and am very much ſurprized to find that they do not at all ſupport it ; becauſe I think that it is a moſt abſurd notion, and might be attended with great inconveniences. Nor do I ſee how the hands of this Court can be tied up by a writ or commiſſion iſſuing out of another court until it is actually notified to the Court by delivering it to the Chief Juſtice or his clerk of the errors according to the practice of the Court.

All the caſes cited before the 21 Car. 2. are either no authorities at all to ſupport this notion, or expreſs authorities againſt it. And the only two that I can find for it are both in the ſame year, viz. 21 Car. 2., when Keeling Chief Juſtice ſat in that court, and are expreſſly contradicted by two caſes in the ſame court 25 and 26 Car. 2.—And theſe caſes ſeem to have been the occaſion of the two orders in this court (and which I ſhall mention at large by and by) made 28 Car. 2. to prevent this miſtake from ſo lately crept in from proceeding any farther.

T

The

more a writ of error, it shall not be a supersedeas comes too late after the judgment is completely

The first case cited upon the present motion was the case of Sir *Christopher Heydon* v. Sir *Roger Goddard*, *Jac.* 342. *P.* 12 *Jac. B. R.*, where it was holden by the Judges (except *Coke*) that a writ of error was a supersedeas in itself, but it was not said from what time so, nor was that at all the point in question. The question there only was whether a writ of error superseded an execution on a judgment *B. R.* on a writ of error out of *B. C.* after the party had a former supersedeas on his writ of error out of *B. C.* Two reasons were alleged against it ; one, because a party shall not have two supersedeas's, which are two writs ; and this notion was founded on what is said of the Year-Books : the other was, because it was not removed out of *B. R.*, but only the writ was sent to the House of Lords : but both these were ruled against, and then follows the saying which I have mentioned.

It was the same point in effect that was in question in the case of the Bishop of *Offord*'s case, *Cro. Jac.* 534, 35. *P.* 1 *B. R.* ; where it was likewise holden that a writ of error was in judgment of law a supersedeas, but not a supersedeas from what time it was so ; nor could that be the question there, because it is stated in the case that the writ was delivered to the Chief Justice in Ireland, and the execution was sued out : but the only ques-

it, and the same term a writ of error is delivered to same court before a writ to the Bishop; held by the same Court that the writ of error ought to be allowed without any other superseas, because it is a superseas itself. So this likewise is no authority for the purpose which it was cited, because it is said that the writ was delivered to the Court before any writ to the Bishop.

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In the case of *Mercer v. Rule*, *Sty.* 159. it was only then that after a writ of error received and allowed the hands of the Court are foreclosed, so that an execution taken out afterwards is irregular. And in 2 *Roll. Abr.* (a) it is said that a writ of error *when allowed* is a superseas in law, but the party is not guilty of a contempt until actual notice (b). The most therefore that is said in any of these cases is that a writ of error is a *superseas from the allowance*.

The first case that I can find, where it is said that a writ of error is a superseas from the sealing of it is the case of *Sir Robert Cotton v. Daintry*, *B. R. P.* 21 *Car.* 1 *Ventr.* 30. The writ there is said to have been sealed an hour before execution sued out, and held that a writ of error immediately on the sealing forecloses the writ; so ordered the money to be brought into court, and said that the sheriff is not in contempt until notice.— This case seems to contradict itself; for if a writ of error be a superseas from the sealing, the execution cannot emanavit, and so the money ought to have been paid to the defendant, and not brought into court.

There is another case reported in the same year in the same court, which is the case of *Hughes v. Underwood*, 21 *Car.* 2., reported in 1 *Mod.* 28., where it is said *Keeling* Chief Justice that the very sealing of a writ of error is a superseas to the execution, and that it was a superseas in that case, though the writ of error was false and erroneous, and though the record is not moved thereby.

These are the only two cases that I can find where this doctrine is laid down, and both of them when *Keeling*

¹ D. pl. 7.

Capron v. Archer, 1 *Burr.* 340, and *Jaguel v. Nixen*, 1 *D. & E.* 5. F. See also *Lane v. Bacchus*, 2 *D. & E.* 44.

1741. Chief Justice presided in the court of *B. R.*, and not long before the law was holden to be otherwise in that very court. For in the case of *Baker v. Bulstrode*, 1 *Ventr.* 255. *H. 25 & 26 Car. 2. B. R.* it was held that if the plaintiff in error do not shew the writ to the other party, or get it allowed by the clerk by indorsing recipitur on it within four days, (which time is allowed by the Court as a convenient time for putting in bail) a writ of error is no superseas. And the case of *Agers v. Lamball*, in 3 *Keb.* 308, 9. *P. 26 Car. 2.* is a case to the same purpose; for it is there said that a writ of error before allowance or shewing it to the Court is no superseas. And there is another case in 3 *Keb.* 191. exactly to the same effect.

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In 1 *Mod.* 112. *P. 26 Car. 2. B. R.*, it is said by *Hale* that formerly if execution were gone before a writ of error delivered or shewn to the party, it was not a superseas. And *Wild* said that a man must not keep the writ in his pocket, and think that this will serve. At another day *Hale* said it shall not be a superseas unless shewn to the party, and he must not foreflow the time having it allowed; for if it be not allowed within four days, it is no superseas; and he said that a writ of error taken out, if it be not shewn to the clerk of the other side nor allowed by the Court, is no superseas to the execution.

And in order to prevent this notion, that a writ of error was a superseas from the time of its sealing, from proceeding any farther, and to establish the law in this respect, there were two rules made in the court of *B. R.* very soon afterwards, and which remain unaltered to this day. The first was made in *T. 28 Car. 2.*, and is signed by Lord Chief Justice *North* only, in which there are these words "That all attornies do forthwith bring their writs of error, by them sued out, to the clerk of the Court, to be allowed according to the ancient practice of the Court, or in default thereof the plaintiff's attorney in the action is and may be at liberty to proceed to execution." The other was made by the whole Court *M. 28 Car. 2.*, and is thus, "ordinatum est quod omnia brevia de errore indilate deliberentur clerico errorum pro tempore existente; quodque nemo tenebitur abstinere a prosecutione executionis pretextu alicujus brevis de errore"

more priusquam prædictum breve deliberatur clerico
ratorum &c.

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Since the making of these rules I cannot find one case in the books where the former error has been revived, though the nation has (I believe) prevailed again of late in both courts without the least foundation either from reason or authority. I could cite a multitude of cases to establish the rule that I contend for, but I shall only mention some few.

In the case of *Smith v. Coss*, 3 *Lev.* 312. *H. 2 W. & M. B. C.* it was holden that by taking out a writ of error, allowing it, and giving bail, the hands of the Court were tied up; for in that case the writ had been allowed and bail put in before the execution in ejectment; and for that reason the execution was set aside and restitution awarded, but no costs were given, because it was said that the plaintiff was not in contempt until actual notice.

In the case of *Parkins v. Woollaston*, *Salk.* 321. *P. 3 An. B. R.* it was said that a writ of error is a *superfedeas* from the time of the allowance, and that is notice of itself: but if the defendant has notice before the allowance, it is a *superfedeas* from the time of the notice. The same case is reported in 6 *Mod.* 130.: and it is there said by the Court that the opinion in some books was that a writ of error was a *superfedeas* to avoid the execution from the sealing thereof though not to punish the officer till a *superfedeas* comes, and that *Rolle* was of this opinion, but that the law is now taken that it is not a *superfedeas* till notice to the plaintiff's attorney, and that the allowance thereof is sufficient notice; and they held that, if execution be executed before notice of a writ of error, the return or perfection thereof may be afterwards.

The case of *Moorfoot v. Chivers*, *T. 11 Geo. 1. B. R.* is to the same purpose, and is reported in a book called *Modern Cases in Law and Equity* (a), printed by *Osborn*, fo. 373. There on a motion to set aside an execution as being executed after a writ of error, the case was thus;

(a) 8 *Mod.* 373; and 1 *Sir.* 632. S. C.

the

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the writ of error was allowed about two in the afternoon, and about the same time the execution was served; it was insisted on the one side that the hands of the Court were tied up from the allowance, on the other that it must be from the notice of the allowance; and they held that if the plaintiff in error could shew that the writ was sued out *and allowed* before the execution taken out, it must be set aside, though the defendant in error had no notice of it.

I shall mention no more cases, though I could cite many to the same purpose, because (as I said) I can meet with no cases to the contrary in the books since the 26 *Car. 2.*

My Brother *Fortescue A.* indeed mentioned one anonymous case to me which (he says) was determined in *R. M. 1 & 2 Anne*; in which (as he reported it to me) it was said by *Holt* that a writ of error is a supersedeas, though not allowed; the party indeed shall not be imprisoned without notice, but the mere taking out of a writ of error is a supersedeas, so that if execution be taken out after a writ of error is taken out it shall be set aside, and this has always been the distinction. But as I cannot find this case in any of the books, and as it is contrary to the reason of the thing and so many cases, some of them cotemporary with this, I do not give any credit to this report, nor can I believe that so great a man as *Holt* would say that this has always been the distinction, when he must know that the distinction had always been otherwise, except in the two cases before mentioned.

The case of *Spinks v. Bird*, which came on before this Court, *P. 10 Geo. 2. (a)* was not directly to this point.

(a) The following short note (1) of that case, which appears to have been taken in court, is copied from another of Lord Chief Justice *Willer's* MSS. May 14th, 1737. "*Spinks v. Bird.*" Question whether a supersedeas of a writ of error will supersede an exigent taken out on a *capias ad satisfaciendum*.

Parker Serjt. for the defendant. Error before the exigent, but allowed afterwards. Error teste'd 5th *February*; exigent 7th; allowance 8th. That writ of error supersede process 2 *Hen. 7. fo. 12. pl. 13.* A person being taken in execution before, the error did not supersede it. But, if before execution, held

(1) See also *Barnes* 4to. 434.

as on an exigent taken out after a writ of error 1741.
 , and we stayed proceedings upon it for that reason :
 own that, being then just come into the court, and
 is positively averred by my Brothers *Denton* and
Care that it was an established rule that a writ of error
 supersedeas from the time of the sealing, I then
 into their opinion without further inquiring into it.
 upon looking into the cases there cited, and finding
 one of them, except these two before mentioned,
 nted this opinion, and being satisfied that it is with-
 out least foundation, I do not consider myself bound
 opinion which I then rather came into than gave.

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ere is but one thing more that is necessary to take
 : of upon this head, which is that it was said that
 rit is to be considered as a commission, and that
 fore it is a supersedeas from the time of the sealing,
 ermining the jurisdiction of this Court from the
 of the sealing, and giving it to the Court of B. R.
 his notion, when considered, will be found to have
 e in it as the other. For in respect to commissions,
 expressly said by Lord Chief Justice *Hale*, in his
of the Crown, that a new commission of oyer and
 ner does not supersede the former commission until
 , either by shewing the new commission, by pro-
 tion in the country, or by holding a session under
 ew commission. And in his *History of the Pleas of*
crown, vol. 2. fo. 25, there are these words " A
 ommission determines the old one by notice thereof

aw, that it supercedes it. *Latch.* 57. 1 *Ventr.* 255. Writ of error
 edces from taking it out: but the party not in contempt till notice. 1
 39 *Reff. Ent.* 309. b. pl. 7. an express authority. The form of all
 keas is that, if the sheriff has not executed the judgment before the re-
 the supersedeas, the sheriff shall cause all process, exigent &c, to stay,
 vv. 378. *Thef. Brev.* 293. *Cliff's Entr.* 693, 694. The reason is,
 in suspense whether judgment right or not. 2 *Cro.* 342, 535. Writ
 ut in this case for a satisfaction, and not for appearance. Said that an
 y is not considered as an execution; answer, it does not become the
 process till after the outlawry: but then it is the King's proceeding, so
 in the statute.

ple Serjt. admits that a writ of error stays execution, but insists this is
 of the execution though in order to it. Writs of error formerly pleaded
 ment or bar: but now the course otherwise, that the party shall proceed
 ment but not to execution. 8 *Co.* 143. Dr. *Drury's* case; 1 *Rel. Abr.*
 Admits the precedents are that they shall not proceed to outlawry after

Curiam. " The rule for discharging the supersedeas, so far as it relates
 exigent, discharged."

and

1741. thereof and shewing it to the new commissioners as to all those and those only to whom it is shewn."

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Whether therefore a writ of error be considered as a writ, or a commission, we are all clearly of opinion, as to the first point, that it is no supersedeas till shewn to the Court, or allowed by the proper officer; and that therefore in the present case the fieri facias was well sued out, and (so far as the sheriff has gone) well executed.

This being our opinion on this point, it becomes necessary to consider the second question, how far an execution taken out regularly before a writ of error allowed shall be stayed by a writ of error allowed afterwards. If it were a capias, that being a complete execution, it has been holden that a writ of error comes too late afterwards, for that the judgment is completely executed, and therefore the party shall remain in prison notwithstanding the writ of error. And so it was held in *M. 6. H. 6. 4.* and *H. 2 Hen. 7. 12. pl. 13.* as I have taken notice before. But *Qu.* how far this is reasonable since the statute 3 *Jac. 1. c. 8.* and 16 & 17 *Car. 2. c. 8.* in such cases where bail is actually put in to answer the debt or damages and costs pursuant to the direction of those statutes.

In *Cro. Eliz. 597.* the case of *Charter v. Pater, H. 6. Eliz. B. R.* was thus; a fieri facias was awarded, by virtue whereof the sheriff took the defendant's goods, and before sale the record was removed into the Exchequer Chamber by writ of error, and a supersedeas awarded; the sheriff returned a seizure of the goods, and that they remained in his hands *pro defectu emptorum*; a restitution was prayed, but denied; and it was holden *per totam Curiam* that as the sheriff had begun (a) the execution regularly he must complete it as far as he had gone; and a *venditio ni exponas* was awarded to perfect it. It is then said that it was so held in the case of *Sir Miles Corbet v. Rookwood, T. 39 Eliz. B. R.* though the record was removed by a writ of error. And in *Dy. 98. a. 99. b. p. 1. M.* there is a case exactly to the same purpose.

(a) See also *Cooper v. Chitty, 1 Black. Rep. 69*; and *Expts v. Dugh-4 Durnf. & E. 411, 412.*

In *Moor* 542. H. 40. Eliz. B. R. if the sheriff take 1741.
 goods in execution on a fi. fa., and has them in his hands
 not sold, then a superseas comes to the sheriff, yet he
 shall not deliver the goods but shall proceed to the sale of
 them, because the beginning of the execution was before
 the superseas delivered, and the execution being entire
 shall not be divided. MERITON
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In *Yelv.* 6. *Tecock v. Honyman*, Tr. 44 Eliz. B. R. a writ of error and superseas to the sheriff after a fieri facias, he shall proceed to the sale of the goods which he has before the superseas, but shall levy no more; per totam curiam. In 1 *Ventr.* 255. in the case of *Baker v. Bulstrode* before cited it was held that if before the writ of error the sheriff returns fieri feci et non inveni emptores, the execution is not to be undone. And in 1 *Salk*, 322, 323. in the case of *Clerk v. Withers* it is said that the execution is one entire thing, and is not to be superseded after it is begun.

The only case to the contrary is in 2 *Rel. Abr.* 491. (a), where it was said that if the superseas comes before sale, the goods shall not be sold, because (as it is said there) the property is not altered by the sale (b); which reason not being a true one, I give no credit to this case.

The case of *Dr. Drury* in 8 Co. 143. a., though not directly to this point, may not be improper to be mentioned on this occasion as it may tend to illustrate the matter. It is there said that if an erroneous judgment be given, and the sheriff by virtue of a fieri facias sell a term, and afterwards the judgment is reversed, the sale is good and only the money is to be restored, because the sheriff was compelled to sell; otherwise in the case of an outlawry, where he is not compelled to sell, but the term is only to be taken into the King's hands ut de vero valore &c; for there if the outlawry be reversed, the party shall be restored to his goods.

The form of a superseas for this purpose, as it is in *Officina Brevium* 378, is thus, "That if the judgment be not executed before the receipt of the superseas, the

(a) D. pl. 5.

(b) Seizure. Vid. 2 *Rel. Abr.* 491.

sheriff

1741. *sheriff is to stay from executing any process of execution until the writ of error is determined."* From whence it likewise appears that if the execution be begun before a writ of error or supersedeas delivered, the sheriff ought to proceed to complete the execution so far as he has gone, but not to proceed any farther.

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against
SERVENS.

From these authorities and the reason of the case we are of opinion in the present case that the sheriff ought to proceed to the sale of the goods which he hath already levied, and to return the money into Court to abide the event of the writ of error.

And we made a rule accordingly."

M. 15 G. 2. THOMAS REIGNOLDS *against* SIMON EDWARDS
Thursday, Clerk and WILLIAM DILLOW.
Nov. 12th.

A. the owner of a close situate within a close belonging to B., had a prescriptive right of way through B.'s to his own: twenty-four years ago B. stopped up the old way, and made a new way which was used ever since but lately B. stopped up the new way;—in an action brought by B. against A. for going over the new way, it was holden that A. could not justify using this way as a way of necessity, but that he should either have gone the old way and thrown down the inclosure, or brought an action against B. for stopping up the old way.

TRESPASS, for that the defendants on the 1st of May 1739 and at divers times between that day and the 1st of October 1740 broke and entered the plaintiff's closes called *Limepit's hole* and *Upper Field* in the parish of *Tugford* in *Shropshire*, and trod down and consumed his grass and corn there growing with their feet by walking, and other grass and corn a/c up trod down and consumed with cattle, and his soil with the wheels of carts waggons and other carriages subverted, and his hedges gates and fences there then erected and standing broke cut in pieces and threw down &c. Damages 1000l.

The defendants to all the trespasses (except breaking the said closes and treading down and consuming the grass there growing with their feet and eating up &c the same with cattle, and subverting the soil with the wheels of carts &c, and breaking &c one of the said gates) plead not guilty; and thereupon an issue is joined.

And as to these trespasses they plead specially that the said two closes of the said plaintiff and one acre by stopping it up determined his pleasure.

of

id parcel of the rectory of *Tugford* aforesaid, which
 : time when &c and long before was and still is in
 occupation of the defendant *Edwards*, time out of
 until about twenty-six years ago were the several
 of a certain common field called the *Upper Field* in
 id parish, several parts of which did belong to divers
 ns as tenants and owners thereof about twenty-six
 last past when the said plaintiff became tenant and
 r of all the said field, except the said acre parcel of
 id rectory, which said field for all the time afore-
 until the plaintiff became owner thereof lay open
 ninclosed; and further plead that the said acre is
 me out of mind was parcel of the said rectory; that
 as *Knight* clerk long before the time when &c was
 ill is rector of the church of *Tugford*, and was seised
 : said acre with the appurtenances in his demesne as
 : in the right of his church; and that all the rectors
 : said church time out of mind until the inclosure of
 id field by the said plaintiff had and were accus-
 have for themselves their farmers and tenants of the
 ere a certain way from the King's highway in *Tug-*
 nto and through a certain lane there called *Colley*
low Lane, and from thence into through and over
 art of the said field which lay next unto the said acre
 id, and from thence back again to the said highway,
 return and pass and to drive their cattle, waggons,
 carriages &c, every year at all times of the year at
 will and pleasure, for the convenient tillage and ne-
 y occupation &c of the said acre of land; and fur-
 plead that about twenty-six years ago the plaintiff
 ne tenant and owner of all the said common field,
 & the said acre, and that shortly after viz. about
 y-four years ago he inclosed the said field with
 s &c and stopped up the said way, and hath kept
 ime stopped up ever since, and that before the said
 ure the said field lay open on the north side
 of contiguous to the King's highway leading from
 's *Ditton* to *Tugford*, commonly called *Bridg-*
Road, and that the plaintiff soon after the said
 ure made a gateway or passage from the said
 way into the said field at or near to a place called
pit's hole and set up a gate there for a way as well
 ie plaintiff to go return and pass and drive his cattle
 ons carts carriages &c backwards and forwards from
 id highway into that part of the said field called
Limepit's

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1741. *Limepit's bole* and from thence into another part called the *Upper Field*, and from thence back again to the said highway, as for a way for the tenants and occupiers of the said acre of land to go return and pass &c from the said highway into through and over the said other part of the said field called the *Upper Field* to and into the said acre, and from thence back again to the said highway &c. And they further plead that the way into the said acre at the time when &c and at the several times in the declaration mentioned from the time of inclosing the said field was in and through the said gateway to go return pass &c, which said way the said *Knight* and all the rectors of the church aforesaid and their tenants and farmers of the said acre have had and used and of necessity ought to have and enjoy for the tillage &c of the said acre; and further say that there is not nor at the time aforesaid nor at any time since the said inclosure was there *any other way or passage left open* to the said acre but in and through the said way into the said close called *Limepit's-hole* &c. And they further plead that the said *Knight* being so seised before the time when &c viz. on the 12th of *April* 1737 demised to the defendant *Edwards* (inter alia) the said acre of land, to hold from the 25th of *March* then last past for one year and so from year to year as long as both parties pleased; that by virtue thereof the defendant *Edwards* entered into the said acre, and was and still is possessed thereof; and the other defendant justifies as servant of the said *Edwards* and by his command going with cattle carts carriages &c in the said way through and over the closes in the declaration mentioned, using the said new way; and because the said gate set up in the said new way at the time when &c and at the days and time in the declaration mentioned was locked up and chained with a lock and chain, the said defendant *Edwards* and the other defendant by his command at the time when &c and at the divers other times &c did necessarily a little break and cut the said gate, and did throw down the same in order to have *their necessary passage there* with the cattle waggons &c of the said *Edwards*, and did with their feet and cattle tread down and consume a little of the grass growing there, and the said cattle did by snatches and morsels against the will of the said defendants bite and eat a little of the grass growing in the said closes in the said way and on the sides of the same, and the defendants did

a little

to subvert the soil there in the same way with the wheels of the waggons, &c, doing as little damage as they could, which is the same trespass &c; and this they are ready to verify, and pray judgment &c.

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To this special plea the plaintiff demurs generally, and the defendants join in demurrer.

Welford Serjt. for the plaintiff, and *Bootle* Serjt. for the defendants.

The objections to the plea were that the defendants set forth a prescriptive right to the old way, which still remains notwithstanding the inclosure; that as there is no grant set forth of the new way the defendant's plea is to that is only by sufferance; that it was merely a matter at the will of both parties; and that the plaintiff might determine his will whenever he pleased, and then the defendant would have a right to throw down the inclosure and go the old way again, or bring an action for obstruction; or that the defendant might determine his right whenever he pleased by refusing to accept of the new way any longer, and insisting on his right to the old way; that the plaintiff in this case had determined the matter to the new way by locking up the gate; and that therefore in this case the defendants ought not to have thrown down the gate, but to have insisted on their old prescriptive right.

To these objections it was answered by *Bootle* that this being laid out by the plaintiff himself on his stopping the old way, which he had no right to do, and it having been enjoyed by the plaintiff's consent for so many years together by the occupiers of the one acre, it gave him a right to this new way; or at least that the plaintiff should not be allowed to take advantage of his own wrong; what the defendants had done they were compelled to do by the plaintiff's wrongfully stopping up the old way. If he insisted very much on the necessity of the case, it was alleged in the plea that the defendants were necessarily obliged to go this way to their close, there being no other way, which was confessed by the demurrer: And every man must have a way to his land, necessity may make a right. And he said that if the defendant had brought

his action for obstructing the old way, he would have recovered but very little damage, when it had appeared in evidence that the plaintiff had left out a good new way for him, and which had been acquiesced in for so many years. And he cited the case of *Horne v. Widlake*, *Yelv.* 141. (a), which was thus; trespass for breaking and entering the plaintiff's close and spoiling his grass; the defendant pleads that in the close where &c there had been time out of mind a footway for all his Majesty's subjects in through and over the said close to such a place, and that the plaintiff on such a day before the trespass ploughed up the footway and sowed it with corn and laid thorns at the side, and near the said foot-way in the said close left and assigned another foot-way for all his Majesty's subjects, which way so laid forth had been used for all foot passengers; and that the defendant at the time when &c went in the said foot-way &c doing as little damage as he could, which is the same trespass &c, and demands judgment; the plaintiff demurred; and it was adjudged against him, for the plea of the defendant is a good excuse for the trespass, because the plaintiff was the first wrong-doer, and also because he laid out this new way, and so shall not sue the defendant contrary to his own agreement; as if there be a foot-way under the hedge in the close of J. & he removes the hedge further into the close, if passengers using their way go as near to the hedge where it is newly placed, they shall not be sued for it, for the injury (if any) arises from the act and tort of the plaintiff, and *volenti non fit injuria*. And a case was cited 8 *Ed.* 4. 5. a. if water runs through the land of M., and he stops the water in his own close so that it surrounds my land, I may enter in his close to remove the obstruction, and he shall not maintain an action. The same law is the principal case; *per totam Curiam*, except *Yelverton*. And *Bootie* argued farther that, if this defence were not good, a man might lose his ancient way, and so have no way at all; for after an acquiescence for a great number of years (and it will be the same after fixty as after twenty-six) if a plaintiff might stop up the new way, the defendant by reason of the death of the witnesses or for

(a) 1 *Brownl. and Gouldst.* 212. S. C. Et vid. *Horn v. Taylor*, *Ny 128*

n can have a right to a way only by prescription,
or necessity ; and I much doubted whether a man
; such a right by necessity (*a*) only, though it is a
vidence of a right. Now it is not pretended that
ndant has a right to this new way either by grant
ription. Nor has he a right by necessity, if that
ive a right ; for though it is said that he has
this and that it is confessed by the demurrer, it
; for nothing is confessed but what is well pleaded.
another way is set forth in the plea, to which he
ht by prescription, this part of the plea that he has
; way is repugnant to the other part of the plea,
efore void. Besides the defendants have not
that there is no other way, but only that there
any other way or passage then left open. This new
efore was only a way by sufferance, and either
ight determine it at his pleasure ; and the plaintiff
ase has determined his will by fastening the gate,
ic defendant ought to have had recourse to his old

is not like the case in *Yelverton*, for there the new
open at the time of the trespass, and so long as
lies open the right continues. As to what was
: a man by this contrivance after a length of
ay lose his prescriptive right ; if he do, it is
fault by accepting a new way without a grant (*b*)
m it. Besides here no such inconvenience will

1741. after evidence against the plaintiff and all claiming under him. And as to what was said that if the defendant in this cause had brought his action, he would have recovered very little damages, it is a mistake ; he would indeed have recovered very little damages, if he had brought his action whilst the new way was left open : but if he had brought his action in the present case after the plaintiff had stopped up the new way, he would probably have recovered very considerable damages.

So judgment was given for the plaintiff."

M. 15 C. 2.

Friday,

Nov. 13th.

A defendant who praysoyer of a deed, is entitled to a copy of the attestation and of the names of the witnesses, as well as of every other part of the deed.

LONGMORE *against* ROGERS. (a)

"A RULE had been made in my absence on the motion (b) of Serjt. Wynne for setting aside a judgment by reason that the plaintiff had not given the defendant a right (c) oyer of the bond and condition. The objection (which was verified by affidavit) was that the plaintiff did not give him a copy of the attestation and the witnesses' names, nor of some memorandum or subscription that was written at the bottom of the bond, but refused so to do.

(a) In *Barnes* 263, by the name of *Longman v. Rogers*.

(b) "M. It appeared in this case that the attorney for the defendant was in the prison of the Fleet at the time of giving notice of this motion ; and the plaintiff insisted on the Stat. 12 Geo. 2. c. 13 f. 9. that an attorney when in prison could not act as such, but ought to be struck off the roll : but upon looking into the statute, it is so expressed that it only extends to attorneys for plaintiffs (1). Besides it is said there that if they had begun to be attorneys in a cause before they were in prison, they might go on afterwards to act in the cause though they were in prison. And it did not appear in the present case that the attorney was in prison when he first became attorney for the defendant." M. S. *Willes* Lord Chief Justice.

(c) If the defendant, after praying oyer of a deed, do not set out the whole of it, the plaintiff may sign judgment as for want of a plea, or the Court on motion will quash the plea. *Wallace v. The Duchess of Cumberland*, 4 *Durnf. & East* 370—So if the defendant set out a false oyer, the Court will order the plea to be struck out, and give judgment for the plaintiff. *Ferguson Bart. v. Macdonald* Hil. 24 Geo. 3. B. R. cit. *ib.* in note.—And if the defendant, after craving oyer of a deed, (of which profert is made in the declaration,) do not set it out in his plea, the plaintiff in delivering the issue may set it forth as part of the declaration. *The Weavers' Company v. Wear*, M. 18 Geo. 2. C. B. MS. *Willes* Chief Justice ; and *Barnes*, 327.

(1) And an attorney, in prison, may sue for himself. *Kage one &c v. Durnf. & East* 671.

all material, as appeared by the bond itself which
luced in court.

cers of the court said that a copy of the witnesses'
been seldom or never given, because seldom do-
whether necessary or not, if required, they doubted.

erjt. insisted that it was necessary, if required; and
it be as necessary to inform the defendant what to
condition. For he might forget at a great dis-
ne whether he had executed the bond or not, and
reminded of it by seeing the witnesses' names, or
recourse to them to inquire whether he executed
And that the memorandum might amount to a

And that the plaintiff was not to judge for the
whether material or not. And he cited the case of
Abell in this court, *H. 10 Geo. 2.*, where a me-
and indorsement were ordered to be set forth on

Fortescue was of opinion that the witnesses' names
be set forth, nor a copy given of that part of the

Parker said that, on oyer prayed, the bond and con-
to be set forth on the imparlance-roll; but that
of late being seldom made up unless in particular
practice for many years had been for the plaintiff to
fendant a copy of the bond and condition. And he

1741. chiefly weighed with him (he said) to make the rule absolute
 LONGMORE was that the plaintiff (though desired) had not given the de-
 against fendant a copy of the memorandum written at the bottom of
 ROGERS. the bond which it might be material for him to know, and the
 plaintiff was not to judge for himself.


Mr. J. *Burnett* said that formerly when oyer was prayed the deed was brought into court, and continued there the whole term for the defendant to inspect it as much as he pleased. And he thought that this new method, which was substituted in the room of the old one, ought to be equally beneficial to the defendant, and that therefore he ought to have a copy of every thing that was written on the bond or deed.

I was of the same opinion; and the rather because the witnesses' names and the attestation were formerly inserted in the deeds themselves, and were considered, as is said in *Co. Lit. 6 a.*, as a part of the deed, and that this practice continued in *Henry the Eighth's* time, and there said that the seal is an essential part of a deed; and likewise because I thought it might sometimes be very material for the defendant to know the witnesses' names to enable him to plead, for the reason before mentioned.

But the practice of the Court having been of late considered to be otherwise, we did not think proper to set aside the judgment for this reason as irregular, it appearing on the face when produced, that the memorandum underwritten was altogether immaterial in the present case, and that it was written after the bond was executed, and was not subscribed by the parties."

(It appears however that on a subsequent day, *Tuesday, November 24th*, the question was revived, when the judgment was set aside.)

Tuesday, " This was the matter of the oyer which came on upon
 Nov. 24th. motion on behalf of the defendant to set aside the judgment because the plaintiff on the defendant's praying oyer had not given a copy of the attestation and witnesses' names to the bond.

Brothers *Parker* and *Burnett* (absent Mr. J. Fortescue 1741:
 occurred with me in opinion that the defendant was 
 to a copy of the attestation and witnesses' names, for LONGMORE
 the defendant is entitled to oyer, not by any rule of this against
 but by the law of the land which is observed in all ROGERS.
 And that therefore, as it is not in our power to de-
 defendant of the benefit of the law, if we altered the
 we ought to substitute a new one in its stead equally be-
 l to a defendant as the old one, which this plainly was
 nless he had a copy of the attestation and witnesses'
 ; for though they could not be material as to enabling
 plead a special plea on the foot of the condition, they
 be very material for him to know for several other rea-
 s whether he should plead non est factum, or make any
 : or not.

being informed by the prothonotaries that this had not
 been taken to be the course of the Court of late, we thought
 it better to make a new rule to ascertain this matter for the
 ; and that the most just that we could make in the pre-
 sent case was, to set aside the judgment without costs, and we
 made a rule accordingly (a)."

the party, of whom oyer is demanded, is allowed two days for that
Page v. Divine, 2 D. & E. 40.---If a deed be lost, the plaintiff
 is allowed time on the deed as lost by time or accident, without a profert. *Read v.*
3 D. & E. 151. So he may declare that a release was cancelled by
 of the releasor being taken off and destroyed or lost; with a profert of
 time of the deed. *Bolton v. Bishop of Carlisle*, 2 H. Bl. Rep. 259.
 he make a profert of a deed (lost) in his declaration, and the de-
 demand oyer, the Court will order that a production of a copy of the
 (any) shall be good oyer, or they will give the plaintiff leave to amend
 ration by stating that the deed is lost. *Tottry v. Nesbitt*, Tr. 24 Geo. 3.
 cited in 3 D. & E. 153. Note; and *Matison v. Atkinson*, E. 27. G. 3.

SKIPP against HARWOOD.

WE rejected the affirmation of a Quaker on a motion
 for an attachment for breach of a rule of nisi prius,
 which was made a rule of this court; though it was said by
 counsel that it had been allowed to be read in the King's
 in order to obtain a rule nisi for an attachment though
 to be read when cause was shewn, which seemed to us

M. 15 Geo.
 2. Tuesday,
 Nov. 24th.

The Court
 refused to
 receive the
 affirmation
 of a Quaker
 on a motion
 for an at-
 tachment for
 non-perfor-
 mance of an
 order of
 Court.

1741.

 SKIPP
 against
 HARWOOD.

to be very absurd. And therefore we did not believe the Court of King's Bench allowed it; especially since it refused to be read in that court in the case of *Oliver v. rence* (a). *H. 6 Geo. 2.* even on a motion for an attachment for non-payment of costs, which is more in the nature civil (b) suit than any other attachment whatsoever. A case was likewise cited in the King's Bench where an attachment had been permitted to be read on a motion for

(a) Since reported in 2 *Str.* 946—where the affirmation was the foundation of an intended rule to answer the matter in an affidavit.

(b) By stat. 7 and 8 *W. 3. c. 34. f. 1.* It is enacted that every who shall be required upon any lawful occasion to take an oath in where by law an oath is required, shall, instead of the usual form, be permitted to make his or her solemn affirmation, &c; with a proviso (sect. 6.) Quaker shall be permitted to give evidence in any criminal causes. It was only to continue in force for seven years—but it was afterwards renewed by stat. 22 *Geo. 2. c. 46. f. 36.* it is enacted that in all cases where an oath is allowed or required the solemn affirmation of a Quaker shall be taken instead of such oath; provided (sect. 37.) that no Quaker be permitted to give evidence in any criminal cases &c. On the contrary these acts of parliament it has been decided; 1st, That where the offence the prosecution is criminal, the affirmation of a Quaker cannot be received. *R. v. Wych*, 2 *Str.* 872, and 1 *Barnard*, 346, a motion for an information was refused; *R. v. J. Gardner*, 2 *Burr.* 1117. S. P.; *Oliver v. rence*, *sup.* 2 *Str.* 946, a motion to answer the matter in an affidavit; *Green*, 1 *Str.* 527, and *R. v. Gumbleton*, 2 *Atk.* 70, both applications were refused. 2dly, Even though in form it be a criminal proceeding; as in an appeal of murder, *Castell v. Bambridge*, 2 *Str.* 856. Unless the application be against a Quaker, and there his own affidavit may be received, though the proceeding be of a criminal nature, *Shackleton* 8 *Geo. 2. B. R. Andr.* 201. n; *Hudson v. Jones*, 8; 1 *Gardner*, 2 *Burr.* 1117; and *Cowp.* 394. 4thly, Where the object of the proceeding is of a civil nature, the affirmation of a Quaker may be received. *Arbuthnot v. Everitt*, *Cowp.* 382; an action of debt for a penalty on a tithing act. 2 *Geo. 2. c. 24*; *Powell v. Ward*, cited in *Andr.* 200; a motion for an attachment for not performing an award; *Taylor v. Stott*, cited in 394; even though the proceeding be carried on in the name of the *R. v. Turner*, 2 *Str.* 1219. a rule to shew cause why an attachment should not be quashed. It is true indeed that in *Robins v. Seyward* 2 *Str.* 441. the Court of King's Bench refused to grant an attachment for non-performance of an award on the affirmation of a Quaker, because the "It is a criminal prosecution within the proviso of the statute 7 and 8 *c. 34.*" But as the ground on which that case was decided has since been questioned, the case itself may probably no longer be considered as authority, especially since the cases *Powell v. Ward*, and *Taylor v. Stott* above referred to. When the case of *Robins v. Seyward* was decided, an attachment for not performing an award was considered as a criminal proceeding—but in *R. v. Myers*, 1 *D. & E.* 266. Mr. J. Buller, (in answer to a question) cited from 1 *Atk.* 58 to shew that such an attachment was of a civil nature) said "That case might have been good law formerly; for the Court only looked to the contempt—but it has been settled of late years an attachment for non-performance of an award is only in the nature of a civil execution." See also on this head *J. Baker's case*, 2 *Str.* 1117; *R. v. Stokes*, *Cowp.* 136; *Bonafous v. Schoole*, 4 *D. & E.* 316; *R. v. Mill*, *ib.* 805; and *McWilliam v. Smith*, 8 *D. & E.* 86.

attach

it; but *Parashor* (a), who was concerned in that cause, it was read by consent and to prevent delay, other Court would not have admitted it."

1741.

SKIPP
against
HARWOOD.

(a) Who was one of the prothonotaries.

in the Demise of THOMAS MORRIS and Others
against WILLIAM UNDERDOWN.

M. 15 G. 2.
Friday,
Nov. 27th.

opinion of the Court was delivered as follows by

Lord Chief Justice. "Ejectment for the third part messuages and several parcels of land in *Walmer Rip- Great Mongeham* in *Kent*. The demise is laid on the April 10 Geo. 2. to hold for seven years from the 22d. Defendants plead not guilty; and a special verdict was in which it now comes before the Court.

The devisor devised lands to A. till B. C. and D. attained their respective ages of twenty-one and then to B. C. and D. and their heirs equally to be divided

special verdict is to this effect; that long before the enj &c. one *Richard Morris* was seised in fee of all messuages and lands mentioned in the declaration, of which part is in question; and that the lands are of the tene- gavelkind; that he by his will, 12th of September devised them by these words, "All and singular my tenements lands hereditaments and premises what- tuate lying and being in the several parishes of *Rip- Mongeham*, and also all those my two messuages or tuate with the lands and premises thereto belonging situate d being in *Walmer* now or late in the tenures of *Morris* and *R. Scott*, I give devise and bequeath *William Underdown* of the town of *Deal* and *Anne* his hold to them for so long time and until *William Un- the younger John Underdown* and *Morris Underdown* he said *William Underdown* and *Anne* his wife shall and attain their several and respective ages of one- ty years, then I give devise and bequeath the same

between them as tenants in common, charged with the payment of an annu- ity of 10l. by B. C. and D. equally and propor- tionably out of their se- veral estates then he de- vised other lands to A. in fee; and then gave all the rest re- sidue and re- mainder of his real and personal es- tate not bea-

to E. her heirs executors &c. and directed that his debts &c. should be paid out of given to A. and E.—B. died before the devisor, but (if he had lived) would have : at the time of the trespass and ejectment; it was holden that the devise to B. l devise; and that the heir at law of the devisor (not the residuary devisee) was B.'s share as not being disposed of by the will. ife of lands to A. till B. attains the age of twenty-one, and then to B. in fee, gives interest, defendible to his heirs if he die before twenty-one.

unto

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 DOWN.

unto the said *William Underdown* the younger the said *John Underdown* and *Morris Underdown* and to their heirs and assigns respectively, equally to be divided between them as tenants in common and not as joint-tenants, and to take and hold their respective parts and shares of and in the same as they shall severally arrive at their said ages of twenty-one years and not before, unless they the said *William Underdown* the elder and *Anne* his wife shall before that time depart this life, and that then immediately on the death of the survivor of them the said *William Underdown* the elder and *Anne* his wife I give and devise the same unto them the said *William Underdown* the younger the said *John Underdown* and *Morris Underdown* their heirs and assigns in manner as aforesaid; nevertheless charged and chargeable with the payment of 10s. a-piece to them the said *William Underdown* the elder and *Anne* his wife during their lives and the life of the survivor by half-yearly payments free and clear from all deductions whatsoever by the said *William Underdown* the younger *John Underdown* and *Morris Underdown* and their several heirs and assigns equally and proportionably out of their several estates as they and each of them shall come to and enjoy their parts and shares therein respectively. Also I give devise and bequeath unto the said *William Underdown* the elder and *Anne* his wife all and singular those my messuages tenements and hereditaments &c. *not hereinbefore given and devised standing and being in the parish of Walmer or elsewhere*, to hold to them and their heirs for ever. And after several other devises and bequests immaterial to the point in question then follows this devise; "And the rest residue and remainder of my goods chattels cattle stock ready money plate linen bedding and all other my estate whatsoever both real and personal *not hereinbefore given and bequeathed* I give and bequeath unto *Mary Underdown*, daughter of the said *William Underdown* and *Anne* his wife, her heirs executors administrators and assigns, subject nevertheless to the payment of the legacies charges and sums of money herein after mentioned."

Then he directs how and in what manner some of his legacies shall be paid by the said *Mary Underdown*. And then follow these words,

"And

" And further my will and mind is that as well all debts as
 neral charges and probate of this my last will and testament
 and all other incidental charges touching the execution there-
 as all other sums of money as shall be due and owing at
 the time of my decease shall be paid and discharged out of
 the estate hereinbefore given unto the said *William Underdown*
 the elder and *Anne* his wife and unto the said *Mary Under-*
down equally between them by my executors hereinafter
 named." And then he makes the said *William Underdown*
 the elder and *Richard Underdown* of *Deal* his executors.

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Then the jury find that *John Underdown* died in the life-
 time of the testator, and that the testator continued seised of
 the premises and died so seised in *March 1731*; and that
Thomas Morris, Thomas Morris, Richard Morris, John Mor-
ris, and Richard Morris, the lessors of the plaintiff, are his
 heirs and coheirs according to the tenure of gavelkind; and
 that if *John Underdown* had been living at the time of the
 testator's death and ejectment laid in the declaration he would have
 been then of the age of twenty-one years. That *William*
Underdown the younger was twenty-one at that time, and is
 still living. And that *Morris Underdown* was under the age
 of twenty-one at that time, and is still living. That *William*
Underdown the elder and *Anne* his wife are living; and that
Mary Underdown the daughter and residuary legatee is also
 still living. The rest of the special verdict is only matter
 of form, in order to bring the point in question before the
 court. And upon this special verdict it stands now before
 the Court for judgment.

There were some questions made at the bar that were so
 very plain and clear that we determined them on the first ar-
 gument (a);

As that nothing vested in *John* who died before the de-
 cease, and therefore nothing could descend to his heirs;

That the three sons were tenants in common, and that
 therefore *William* and *Morris* could take nothing by survivor-
 ship;

And that *William Underdown* and his wife at most could
 hold the part of *John* by virtue of the first devise to them no

(a) This case was argued several times

longer

1741. longer than until *John*, if he had lived, would have arrived at the age of twenty-one.

Don dem.
MORRIS
against
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The only question therefore that remains to be determined is whether *John's* third part is to be considered as a lapsed devise, and consequently belonging to the lessors of the plaintiff who are found to be the devisor's heirs at law, or whether passed to either of the residuary devisees, for there are two sets of residuary devisees in the will claiming under different clauses.

The first residuary devisees are *William Underdown* and *Anne* his wife: but as the devisor gives nothing to them of such messuages tenements lands hereditaments &c. in the parish of *Walmer* or elsewhere, not thereinbefore given and devised, and as the premises in question were before given and devised, it is plain, according to all the resolutions, that no estate or interest in these could pass by this devise.

The only question therefore that remains, and which is the subject of any dispute, is whether the premises in question belong to the heirs at law or to *Mary* the general residuary devisee, to whom he has given all his estate whatsoever be real and personal not thereinbefore given and bequeathed, which word *estate* (a) will certainly carry any interest that he had not before disposed of.

And as this question will principally depend on the intention of the testator, I think it may be determined by the three rules, which I take to be now certain and established rules for the construction of wills of this sort.

1st, That the intent of the testator ought always to take place, when it is not contrary to the rules of law.

(a) The word "estate" is alone sufficient to pass a fee; *Countess of Bristol v. The Duke of Bolton*, Salk. 236, and 6 Mod. 106; *Tanner v. Wye*, 3 Wms. 295. and *Caf. temp. Talb.* 283; *Ibbetson v. Beckwith*; *Caf. temp. Talb.* 157; *Scott v. Alberry*, Com. Rep. 337; *Bailis v. Gale*; 2 Vern. 48; *Ridgway v. Pain*, 3 Atk. 486; *Macacree v. Tall*, Amb. 182; *Stiles d. Raymond v. Welford*, 2 Bl. Rep. 938; *Davie v. Stevens*, Dougl. 323, oct. ed.; *Holdfast d. Osper v. Martin*, 1 D. & E. 411;—*Fletcher v. Smiton*, 2 D. & E. 69; *Doe d. Burkhitt v. Chapman*, 1 H. Bl. Rep. 223.—So also is the word "interest"; *Fletcher v. Smiton*, 2 D. & E. 656, and *Tilley v. Simpson*, ib. 659.

idly, That the intent of the testator ought always to be as things stood at the time of making his will, and is to be collected from subsequent accidents which the testator could not then foresee.

idly, That when a testator in his will has given away all estate and interest in certain lands, so that if he were to immediately nothing remains undisposed of, he cannot intend to give any thing in these lands to his residuary devisee.

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Doc dem.
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against
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DOWN.

As to the first rule; as it was never controverted, and has been so long established, I shall cite no case to confirm it; but I only say thus much upon it, that there is no rule of law that stands in the way of the lessors of the plaintiff. But there is a rule which makes greatly for them, that an heir at law shall not be disinherited unless the intent of the testator is manifest and apparent (a); and it will be very difficult to show here that the testator's manifest intent was that his heirs should not have *John's* third part upon his dying before them, not only for the reasons which I shall hereafter mention, but likewise because if that had been his intent he might easily upon *John's* death have made a new will, and given away his estate from his heirs.

As to the second rule, it is so consonant to reason and common sense that it does not want any authority to support it.— If I did, I could mention several: but I think it is enough to say that there is no authority against it. I own that the authority of Lord Talbot in the case of *Hopkins v. Hopkins* (b), which he considered thoroughly and well, is a very great authority, and would stagger me very much if it contradicted the rule: but it does not contradict it at all. For that case is no more than this, the testator *John Hopkins* gave his estate to *Samuel Hopkins* son of his cousin *John Hopkins*, who was his heir at law) for his life, and to his first and every other son in tail male, and in default of such issue to every other son of his cousin *John Hopkins* in tail male, and in default of such issue to the first and every other son of *Sarah* the eldest daughter of his cousin *John Hopkins* in tail male, with several remainders over, and some to persons

a) See *Moore v. Fagge v. Heafeman*, Hil. 12 Geo. 2. sup. 140. and the cases referred to.

b) *Caf. temp. Talb.* 44; and vid. 1 *Atk.* 581.

1741. in being. *Samuel* died before the testator without issue. I cousin *John Hopkins* had no son at the time of the testator's death, and *Sarah* was an infant and unmarried; so that if the limitation to her sons were considered as a contingent remainder it was void, and the estate would go to the next remainder that was then in esse; and it certainly was a contingent remainder at the time of the will made, *Samuel* being then alive: but *Samuel* being dead before the testator, I *Talbot* held it to be an executory devise and consequently good, and that the estate in the mean time should vest in the heir at law; all therefore that he determined was that a subsequent accident might alter the operation of law, and the order that the intent of the deviser might take effect, this in favour of the heir at law, who otherwise would have had nothing; so this case does not at all contradict the rule which I have laid down. The case of *Ashburnham and Ashaw* (a) was cited as an authority for this rule, which was determined by all the Judges on a reference to them by Lord Chancellor: but that case was determined on the particular wording of the statute 9 Geo. 2. c. 36. But so it is an authority that the rule was agreed in that case by all the Judges, and is supported by several cases that were cited as agreed to be law on the arguing of that case.

Dor dem.
MORRIS
aga: B
UNDER-
DOWN.

As to the third rule; it is not only agreeable to reason and several old cases but is established by three modern cases of very great authority; I mean the cases of *Goodright v. Wright* in the court of King's Bench, the case of *Wright v. Wright* and the case of *Roe v. Fludd*, both in this court.

The case of *Goodright v. Opie* (b) was (I believe) first argued in the King's Bench *M. 7 Geo. 1.*, and judgment was given *P. 9 Geo. 1.* The case was then a devise of lands to four persons and their heirs, as tenants

(a) 2 Atk. 36; *Barnard. Ch. Rep.* 6; and 7 *Mod.* 239. There the question was whether a devise of lands to charitable uses made before the Statute of mortmain, 9 Geo. 2. c. 36, were good, the deviser not dying until after the Statute took effect; and it was holden to be a good devise.

(b) 8 *Mod.* 123.

son and not as joint-tenant; then the deviser gives all his messuages lands tenements rents reversions and hereditaments not thereinbefore given or devised and all his goods and chattels and estates both real and personal of what sort or nature soever to the defendant *Opie* &c; one of the devisees died four years before the deviser; the lessor of the plaintiff was heir to the deviser. *Pratt* Chief Justice and *Justice* were of opinion for the plaintiff the heir at law; and *Eyre* Justice and *Fortescue* Justice for the defendants and residuary devisees. It was insisted that this was no authority, because the Court were equally divided: it was certainly no authority at first, but is now become an undoubted authority; because Mr. Justice *Fortescue* (a) afterwards altered his opinion when he came into this court on being informed of the subsequent determination in the case of *Wright v. Hall*; and it is plain likewise that Lord Chief Justice *Willes* afterwards altered his opinion, because he gave his judgment otherwise in the case of *Roe v. Fludd*, which I shall mention presently, and in which likewise Mr. Justice *Fortescue* concurred.

1741,

DOZ dem.
MORRIS
against
UNDER-
DOWN

The judgment was given in the case of *Wright v. Hall* (b) in this court P. 11 Geo. 1. on a case reserved for the opinion of the Court. The case was this; a man devised lands to *Francis Carter* and his heirs, and several other lands to several other persons in fee; and then follow these words; "all the rest and residue of my messuages lands tenements and hereditaments whatsoever in the parishes of *Edmonton* and *St. Andrew* or either of them, or in any other town or parish whatsoever, I give to *John Lammas* and his heirs for ever": *Francis Carter* died before the testator; it was holden by the Court that this was a lapsed devise, and that the lands given to *Francis Carter* should go to the heir at law and not to the residuary devisee; and Lord *King* in delivering the opinion of the Court said that though the will was not complete until the death of the testator so as to vest any thing in the devisee, yet that the intent of the testator is to be taken to the things stood at the time of the making of his will; for

(a) Mr. Justice *John Fortescue Aland*.

(b) P. 11 Geo. 1. S. C.; and 8 Mod. 222. by the name of *Wright v. Horne*.

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Dox dem.
MORRIS
against
UNDER-
DOWN.

the testator makes his will as if he were to die that moment and it cannot be presumed that he intended to devise a contingency which afterwards happened, and which he could then foresee; which is exactly the present case.

The case of *Roe v. Fludd* (a) was likewise on a case served in this court P. 2 Geo. 2.; and though it was said the counsel that no judgment was given, yet my Brother Atescue who was then in court (and who to be sure knows best) says that judgment was actually given by himself and the whole Court. There was another point determined in the case not at all material to the case in question, and therefore I shall only mention so much of it as relates to the present case. A man devised lands to R. Bishop and his heirs forever on condition to pay all his debts legacies and funeral expenses and at the latter end of his will he gives and devises all the rest and residue of his real and personal estate whatsoever before therein bequeathed to Elizabeth Fludd (the defendant). R. Bishop died before the deviser; it was holden by the whole Court that the heir should have the lands devised to R. Bishop, and not Elizabeth Fludd the residuary devisee; that the devise must be taken to mean the rest and residue of the lands unbequeathed at the time of the making of the will, at which time all the estate in these lands was devised; and the case of *Wright v. Hall* was there cited and relied on.

If the case before the Court were a new case, I should be of the same opinion, but I am very glad that my opinion is supported by three such great authorities (b).

The only question therefore that remains is whether the estate or contingent interest in the premises in question remained undisposed of at the time of the making of this will; if there did, this rule and the cases cited to support it do not extend to the present case; and this was the only doubt I ever stuck with me,

(a) Fort. 184. S. C.

(b) See also *Pachman v. Cole*, 2 Sid. 53; 78; *Bagwell v. Dry*, 1 P. 700; *Owen v. Owen*; 1 Atk. 494; *Peat v. Chapman*, 1 Vern. 542; 1 Page, 2 Str. 820, and 2 P. Wms. 489; *Watson v. The Earl of Lincoln*, 325, 328; *Ackroyd v. Smithson*, 1 Bro. Ch. Caf. 503; and *Bennet v. B.* 3 Bro. Ch. Caf. 28.

1748. this in the present case, it being found in the special verdict that *John*, if he had lived, would have been twenty-one years of age at the demise laid in the declaration.

DOR DEM.
MORRIS
against
UNDER-
DOWN.

There were two objections mentioned on the part of defendant, which it may be proper just to take notice of in order to give an answer to them.

The first was that it was the intent of the testator *William Underdown* and his wife should have 10*l.* a-year of the whole premises during their lives, whereas by this construction they will be deprived of one third part of it.

The other was that he has directed his residuary devise to pay his debts funeral expences and some of his legacies, that by this construction the fund may be rendered deficient and some of his debts remain unsatisfied contrary to justice and contrary to his intent.

There was an answer endeavoured to be given to both objections, that the estate will pass cum onere to the devisee but to be sure that is not so, because they do not claim under the will. But the true answer is, to the first objection, it is casus omissus, a case which the testator did not foresee and therefore did not provide for, and we are not to supply a new will for him. And to the latter that he could not intend that this contingent interest should be a fund for the payment of his debts &c, which he could not foresee would ever be paid and which most probably never would. Besides in the first case, if we should construe the estate to belong to the residuary devisee, it would certainly, as that devise is, be not be liable to the payment of any part of the 10*l.* a-year. And in the second case, it is certain that if *John* had survived

he would have meant that the devisee or executor should have the land for so long time as the son, if he had lived, would have arrived at the age mentioned in the will; but that in all cases where no such intention appeared, the estate or interest should be absolutely determine by the death of the party under the age specified; and the devisee's reason for creating the particular estate in that case appeared to be to guard his estate against the ill conduct and extravagance of his son. The Court accordingly ruled that the particular estate ceased on the son's death under 40.

1741, 2. be added to her father's legacy. Item I give to my sister *Mary Wickett* 5l." And he made his wife *Katherine* sole executrix. *Katherine* was not with child at the time of making the will nor at any time by the testator who died three or four days after making his will. The premises in question are lands of which the testator was seised in fee-simple at the time of making his will. The defendants claim a third part under the said *Mary Wickett* one of the sisters and coheirs of the devisor. The lessors claim under *Katherine* the wife of the devisor and his two other sisters *Elizabeth* and *Anne*.

ROX dem.
FULHAM
against
WICKETT

The question reserved was whether, as *Katherine* was not with child at the time of making the will nor at the time of the death of the devisor, and so no such child was ever born, the devise of the remainder to *Katherine* the wife and the two sisters *Elizabeth* and *Anne* in fee could ever take place. If it did, then the verdict for the plaintiff was to stand for the whole; if it did not, the verdict was to be entered up for the two thirds; and costs were by the rule directed to be according to the determination of the question reserved.

This case was spoken to in the last term only before myself and my Brothers *Parker* and *Burnett*; and my Brother *Fortescue* A. was likewise absent when it was spoken to at Trinity term (a); and therefore we did not consult with him about it: but my Brothers *Parker* and *Burnett* and I are of the same opinion.

If there were nothing more in this case but the question reserved on the trial at nisi prius, I own I think it so very plain and so very clear a point, that I should have had no doubt concerning it. But as there has been a judgment given in the Court of King's Bench upon another part of this will, which may at first sight seem to interfere with ours, and as Lord *Harcourt* has made a declaration and in some measure given his opinion upon these very words of the will on which the present question arises, which is not agreeable to our sentiments, for these reasons we have

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 require.

Rox dem.
 FULHAM
 against
 WICKETT

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1741, 2. be added to her father's legacy. Item I give to my sister *Mary Wickett* 5*l*." And he made his wife *Katherine* sole executrix. *Katherine* was not with child at the time of making the will nor at any time by the testator who died three or four days after making his will. The premises in question are lands of which the testator was seised in fee-simple at the time of making his will. The defendants claim a third part under the said *Mary Wickett* one of the sisters and coheirs of the devisor. The lessors claim under *Katherine* the wife of the devisor and his two other sisters *Elizabeth* and *Anne*.

ROE dem.
FULHAM
against
WICKETT

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1741, 2.

ROX dem.

FULHAM

against

WICKETT

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, there were a great many things said and a great many ted in respect to devises to a child in ventre sa mere; in which it was holden that all such devises are void; in hat such devises, if they be devises in presenti, are void, ey be devises in futuro, they are good; and some Judges den. (but I think there is no case so adjudged) that all rises are good, because all of them are in their nature in futuro. It is plain, by the cases which are cited upon d; that many of those who have talked about it have con- themselves by not distinguishing between a devise being initio and it's becoming void afterwards. For (to be a child be never born the devise becomes void. Which opinions in respect to these devises we think to be the will be time enough for us to determine when the case judgment before us. But in the present case we do k it at all material whether this devise to the child of re in ventre sa mere be a good devise or not; for laying se quite out of the case, the subsequent devise will de- on the same contingencies and will fall under just the siderations.

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1741, 2. I shall only say thus much upon it, that we think that the contingencies are not too remote, as they must all happen in less than twenty-two years, and upon the death of a person who must be born in less than a year after the death of the testator (a). There are several cases that have gone much farther than this, but I shall only mention the case of *Massenburgh* and *Vern.* 234, 257, and 304. That was a case upon the limitation of a term in a deed, but it was said to be determined according to the rules of executory devises; and the limitation there was holden to be good, though the contingency did not happen until twenty-one years after a life then in being, but it was held that this was a reasonable time, and that it did not tend to create a perpetuity. And as this case was thoroughly considered, and not determined by the then Lord Keeper until he had had the opinion of the Court of Common Pleas upon it, so it has been cited a great many times both in Courts of Law and Equity, and has always been held to be rightly determined.

Re dem.
FULHAM
against
WICKETT

Many things were likewise said in the argument of the present case, and many cases were cited to shew that the "provided" was sometimes understood to make a condition, and sometimes as a word of limitation; and if it were not, and we had nothing else to do, the books are so fruitful upon this subject that we might cite nearly as many cases upon this head as in cases of actions of slander, which are almost innumerable. But there is but one plain rule to go by, which is, that this must be taken either to be a word of limitation or a condition according to the wording of the will or deed, and according as the intent of the devisor or the parties appears to be. And if it were material to determine this point here, I should try it by this rule: but we do not think it at all material in the present case whether this be a condition or a contingent limitation; for if it be a condition precedent, in that case the devise will not vest until the condition is performed; and if it be a contingent limitation or rather an executory devise (as it certainly is,) in either of these cases (as I have already observed) the devise can never take effect unless the contingency happens.

(a) Vid. *Goodtitle* d. *Gurnall v. Wood*, T. 13 & 14 Geo. 2. sup. 813; *Long v. Blackall*, 7 D. & E. 100.

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Rox dem.
FULHAM
against
WICKETT

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The question reserved was whether, as *Katherine* with child at the time of making the will nor at the death of the devisor, and so no such child was ever the devise of the remainder to *Katherine* the wife and sisters *Elizabeth* and *Anne* in fee could ever take place if it did, then the verdict for the plaintiff was to stand whole; if it did not, the verdict was to be entered for the two thirds; and costs were by the rule directed according to the determination of the question reserved.

This case was spoken to in the last term only by myself and my Brothers *Parker* and *Burnett*; and my Brother *Fortescue A.* was likewise absent when it was spoken at Trinity term (a); and therefore we did not consult about it: but my Brothers *Parker* and *Burnett* and I of the same opinion.

If there were nothing more in this case but the question reserved on the trial at nisi prius, I own I think it so very clear a point, that I should have had no doubt concerning it. But as there has been a judgment given in the Court of King's Bench upon another part of this will, which first sight seem to interfere with ours, and as Lord *Harcourt* made a declaration and in some measure given his opinion on these very words of the will on which the present question is reserved, which is not agreeable to our sentiments, for these reasons

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1741, 2.

Rox dem.

FULHAM

against

WICKETT

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 which have been insisted on, and by many cases which have
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 endeavour to deliver the case from that which does not belong
 to it, in order to find out what the real question is.

First, there were a great many things said and a great many
 cases cited in respect to devises to a child in ventre sa mere; in
 some of which it was holden that all such devises are void; in
 others, that such devises, if they be devises in presenti, are void;
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It appears from another note that the Chief Justice was prepared to give the
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 Lord Mansfield's opinion he reconsidered the case; speaking of this case, he observed
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1741, 2.
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1741, 2. cannot be limited after an estate-tail: but it is plain that the remainder to *B.* in respect to the freehold estate is good.

ROB dem.
FULHAM
against
WICKETT

There is but one case that remains to be taken notice of, and that is the case of *Jones v. Westcomb* (a), which was determined by Lord *Harcourt* in Chancery 30th of October 10. Apr. I have not been able to obtain a report of that case, but so far as I can collect from the decree the principal matter in judgment before the Court was in respect to the personal estate, of which the plaintiffs prayed a distribution as next of kin, as to which the Lord Chancellor did not think proper to give them any relief, and one reason is given, amongst others, that such a suit in a Court of Equity ought not to be encouraged after the right had been submitted to near twenty years. He does indeed declare that the devise over to *Katherine* the wife and the two sisters even of the freehold estates was good, and likewise dismisses the plaintiffs' bill so far as it seeks to impeach their title to those estates; but as it was not directly the point before him, and therefore does not seem to have been thoroughly considered, I cannot lay any great stress upon this declaration of Lord *Harcourt* though a very great man, and the rather because at the end of his decree he has ordered the deeds and writings relating to the freehold estates to be brought into court that the coheirs might resort thereto and take copies of them as they should think fit; which seems as if he determined nothing in respect to this point but left the plaintiffs to try their title at law, and gave some assistance for that purpose. So that I think that Lord *Harcourt's* opinion, for which I should have had the greatest regard if it had been the point directly before him, and he had positively determined, it does not stand in our way.

We are therefore of opinion, for the reasons aforesaid, that the devise in remainder to *Katherine* and the two sisters *Katherine* and *Anne* never took effect, that consequently upon the death of *Katherine* (who died in 1729, though it is not stated in the case,) the third part of the premises in question descended to *Mary* one of the coheirs of the deviser, under whom the defendants claim; and that therefore according to the rule the verdict

(a) *Gillb. Eq. Caf.* 74; *Pres. in Chanc.* 316; and 1 *Eq. Caf. Mr.* 245.

entered up for the plaintiff only for two thirds of the pre-1741, 2.
ces, and as to the other third part for the defendants (a)."

ROX dem.
FULHAM
against
WICKETT

a) But notwithstanding the elaborate discussion of this case by the learned Chief Justice, it seems difficult to support the opinion here given; it being contrary not only to the determination of Lord Harcourt in *Jones v. Westcomb*, (which was used by Lord Hardwicke in *Fomereau v. Fomereau*, 3 *Ath.* 317, 318, and by Lord Mansfield in *Progenitor d. Brampton v. Holyday*, 3 *Burr.* 1623, 4. and in *Ed. Winton v. Shipyard*, Dougl. 79.) and to that of the Court of King's Bench in *Andrew v. Fulham*. T. 21 Geo. 2., both of which cases arose on the construction of this will respecting the leasehold premises, but also to the decision of the Court of King's Bench in a subsequent case, *Gulliver v. Wickett*, M. 19 Geo. 2. *Mag.* 705., on the same question as arose in the principal case (*Roe v. Wickett*) respecting the freehold estate.—See also *Avery v. Ward*. 1 *Ves.* 420; *How v. Barber*, 5 *Burr.* 2703; *Taylor v. Taylor*, 1 *Ath.* 386; and *Statham v. Statham*, 40; the two latter of which cases strongly militate against this decision. In *Taylor v. Taylor*, the words of the will were "as to my copyhold which I have or intend to surrender to the use of my will, I give &c. and the remaining I do give to the child with which my wife is now enfeint and to the heirs of such child for ever: but if such child should not be born alive, or being born he should die without leaving lawful issue, or before he or she has disposed of the same, I give it to my wife." the wife was not with child, and Lord Hardwicke Chancellor ruled that the will must be construed "and if no child be born he &c."—In *Statham v. Bell*, the testator supposing his wife to be enfeint, devised to the child if a son when he should attain twenty-one, if a daughter then one moiety to his wife and the other moiety to his two daughters (there being one then alive) when they should attain twenty-one; if both died before twenty-one their moiety to go to the wife and her heirs, if she died her share to go to him; the wife was not enfeint, the daughter afterwards died under twenty-one, without issue; and held that the wife was entitled to the whole; the test of B. R. certifying to the Lord Chancellor, "that it was the plain intention of the testator that in case no son should be born, and he should have no children who should live to the age of twenty-one years, the wife should have the whole estate."

NEWTON against WALKER.

Hil. 15 G. 2
Thursday,
Feb. 4th.

"**M**OTION against an administrator to pay a certain sum of money which the intestate was obliged to pay by rule of Court entered into at the trial at nisi prius and afterwards, in *Newton's* lifetime, made a rule of this Court.

No attachment against an administrator for not performing a rule of Court entered into by the intestate.

We denied it as we had done in the same case several times before (a).

1st, Because we had no method to enforce the rule even against the party himself if he had been alive, but by process of contempt which is personal, and cannot be carried on against the administrator.

(a) See *Went v. Swayne*, M. 13. Geo. 2. *sup.* 185.

1741, 2. 2dly, Because the administrator may have no assets (a), and this would be a very improper way of trying that matter; nor would a determination in this case bind the the rest of the creditors nor could it be pleaded to any other demand.

NEWTON
against
WALKER

(a) See *Howard v. Ratborne* *infra*, and the cases there referred to.

Wednesday,
Feb. 10th.

HOWARD Executor &c. against RATBORNE,

There may be the like judgment as in case of nonsuit against an executor plaintiff, for not going on to trial, under stat. 14. G. 2. c. 17, but without costs. Barnes 130. S. C.

“THE defendant had obtained the common rule for a nonsuit on the late statute.

And on shewing cause against it, it was insisted that the plaintiff being an executor ought not to pay costs (a), and that therefore

(a) *Bennet* administrator v. *Coker*. 4 Burr. 1928; and *Read* executor v. *Thornton*, Tr. 37 Geo. 3. B. R. S. P.—Nor does a plaintiff executor pay the costs of a nonsuit, in the ordinary case. *Higgs* administratrix v. *Warry*, 6 D. & E. 656.—But he pays the costs of a nonpros. *Hawes* executrix v. *Semden*. 3 Burr. 1584; *Lumley* v. *Nichols*. Sir. G. C. 14; *Say*. Costs, 94; and *Higgs* administratrix v. *Warry*, 6 D. & E. 654. Or costs for not going to trial according to notice. *Eaves* v. *Mecato*, Salk. 314. contra *Bennet* v. *Coker*, 4 Burr. 1927.—In certain cases, where the plaintiff executor has not been guilty of laches, the Court will give him leave to discontinue without paying costs. 4 Burr. 1926, 9.—An executor may make himself liable to costs, by applying to be made party to a rule of Court in which costs are reserved. The executors of *Smales* v. *Wain* one &c. Jan. 27th, 1745, 6. C. B.

“This motion had hung a long time in this court.

The first motion was by *Smales*, complaining of excessive damages in a second writ of inquiry in an action of trespass brought by *Waite* for an exorbitant distress (as was suggested) taken by *Smales* against *Waite*.

There had been a former writ of inquiry, in which 350*l.* damages had been found: but that had been set aside for irregularity; and in the second writ of inquiry the jury found 400*l.* damages.

A rule nisi was obtained to set aside that inquisition as excessive, but was discharged by *Waite* upon shewing cause and reading many affidavits. After that he proceeded to judgment, and a writ of error being brought the judgment was affirmed in B. R., and another writ of error was brought in the House of Lords; and whilst that was pending, it was discovered by *Smales* that *Waite*'s most material affidavits, by which he discharged the rule, were sworn before one *Martindale*, who had no commission to take affidavits. Upon this a fresh complaint was made to the Court by *Smales*, suggesting that *Waite* and his witnesses knew that *Martindale* had no commission and therefore did not regard what they swore, as they were not liable to be indicted for perjury, and that this was a contrivance of *Waite*'s to impose upon the Court by laying false affidavits before the Court in order to get the rule against him discharged. The judgment obtained by *Waite* was affirmed by the King's Bench, and gone up to the House of Lords, &c. out of our power.

We therefore made a rule against *Waite* to shew cause why an attachment should not go against him; and when he came to shew cause, he insisted he did not know at the time of swearing the affidavits that *Martindale* had no commission, (though he admitted that he had none,) and that none of the persons who made affidavits before him knew it, but that both he and they thought that he had one, &c.

erefore costs ought to be left out of the rule. And upon 1741, 2.
oking into the statute,

HOWARD
against
RAT-
BORNE.

We were all of that opinion ; and therefore proposed it to the defendant to waive his rule, as it would be of little or no advantage to him. But he insisting on the rule, we made it absolute, but ordered costs to be left out."

and having taken upon him to take affidavits for other persons for a long time above. And he insisted that nothing was sworn in the affidavits on his part in order to discharge the first rule but what was strictly true.

The Court likewise was informed that an information was granted by the Court of B. R. against *Waite* for his mal-practice in obtaining these affidavits, on a supposition that he knew that *Martindale* had no commission.

Upon this and *Waite's* consenting to stay proceedings upon the judgment, we ordered him to proceed again to execute a writ of inquiry before the judge of assize, without setting aside the former inquisition, but with directions that *Smales* should not insist that a writ of inquiry had been executed before nor upon the judgment which *Waite* had obtained in bar to this inquiry. And we enlarged the rule for an attachment until after the information tried, and the inquisition on this writ of inquiry.

Before either, *Smales* died, and his executors applied to the Court to be at liberty to go on with the trial, and to stand in the place of their testator to all intents and purposes, and a rule by consent was made accordingly. *Waite* being acquitted by a jury upon the trial of the information, we discharged the rule for an attachment against *Waite*, but reserved the costs and all further directions until after the inquisition upon the writ of inquiry. That came on at the last York Assizes, and the jury found damages for *Waite* 40*l.* as the former jury had done, and in motion was made to the Court within the four first days of the last term to set aside the inquisition for excessive damages, or for any other reason.

We were therefore of opinion that Mr. *Smales* had been in the wrong from the beginning, and that *Waite* had not been guilty of any mal-practice, and we made a rule to give *Waite* liberty to proceed on his judgment. And as he had been kept out of his money so long by the motions and proceedings in this court, the first inquisition being in 1741, we thought it reasonable to give him the costs of the last inquisition and the costs of all the proceedings in our court, except of a rule which was made by consent for enlarging the time of the trial from the Lent until the Summer Assizes. It was insisted that the executors ought not to pay costs, as it did not appear that they had assets: but it was answered by the Court that they had made themselves liable by agreeing to stand in the place of their testator, and by entering into a rule by consent, wherein costs were reserved." MS. *Willes* Chief Justice.

—An executor or administrator may also make himself personally liable for the plaintiff's demand by giving a bond to abide by an award to be made touching the matters in dispute between his intestate and the plaintiff, though the administrator award that he, as administrator, shall pay; and consequently to debt on such a bond the administrator cannot plead *administrait*. *Barry v. Rust*, 1 *Durf. & E.* 691.—And for non-payment the arbitrator may be attached, if the submission be made a rule of Court. *Worthington v. Barlow* administratrix, 7 *D. & E.* 453.—But where the arbitrator only ascertains the amount of the demand, without ordering the administrator to pay it, it does not operate as a determination by the arbitrator that the administrator had assets, and if he has no assets, he is not bound to pay. *Pearson v. Henry*, 5 *D. & E.* 6.

ROWLEY

1741, 2.

Hil. 15 G.
2. Friday,
Feb. 12th.

ROWLEY *against* ALLEN (a).

Venue
changed,
after an or-
der for time
to plead.

“**M**OTION to change a venue after a rule obtained from a Judge for further time to plead, but before any pleaded.

All the officers of this court certified that it had been the constant practice of the Court never to change the venue after application for time to plead and a rule or a Judge's ordained for that purpose. That it had been so determined and over again, (of which they gave several instances) and it had been ruled several times that after taking out a *subpoena* summons for time to plead, the party so applying should be at liberty afterwards to move to change the venue.

But my Brother *Parker* and I thought this a most unreasonable practice, and the rather because it was alleged, (and inquiring of the Judges of the King's Bench I find the story to be true,) that in that court they always allow the defendant to move to change the venue at any time before a plea pleaded. And as the rule stands in this court, it is a great hardship on the defendant; for if he lives at the distance of two or three hundred miles the plaintiff may bring his action in *Middlesex* (b) before the attorney can have instructions from his client to change the venue the time for pleading will be out; and applies for further time, he is then, it seems, too late to move for such a motion, which is most absurd and unreasonable.

However we thought ourselves bound by the present practice until we made a rule to alter it, but resolved to make such an

(a) Vid. *Dennis v. Fletcher*, Barnes 489. S. P.

(b) But the distinction that now prevails obviates this inconvenience. The distinction is this; The venue may be changed after an order for time to plead though upon the terms of pleading issuable; but not after an order for time to plead, where the terms are to plead issuable and take short notice of at the first sittings in London or Middlesex, because there a trial would be *Peyt v. Lister*, 511. See also *Lupton v. Clegg*, and *Smith v. Gray*, 752 493; and *Skyley v. Clegg*, 7 D. & E. 693.

MUSGRAVE *against* THOMAS GAVE and
THOMAS FRANKLYN.

1741, 2.

Friday,
Feb. 12th.

The opinion of the Court was delivered, as follows, by

Lord Chief Justice. "Trespas. The declaration is that the defendants on the 1st of May 1738 and at other times between that day and the second of October broke and entered the plaintiff's close, viz. one acre of *Wentworth* in the *Isle of Ely* in a field there called the *Old*, and trod down and consumed with their feet in walking the plaintiff's grass there growing, to the value of 40s., and trod down and consumed other grass of the plaintiff's growing with cattle, viz. horses, mares, geldings, bulls, swine, hogs, and sheep, to the value of 100l.; et alia enorm. To the plaintiff's damage of 10l.

The defendants to the force and arms &c plead not guilty;

as to the rest of the trespasses say that the place in which he times when &c was one acre of land in the said field *Old Field* in *Wentworth*, abutting as is described in the declaration and that the same is and at the times when &c was the land of the defendant *Cave*; so he and the other defendant ought to justify the trespasses laid in the declaration as being the freehold of the defendant *Cave*.

The plaintiff in his replication makes a new assignment, and says that the trespasses laid in the declaration were done in one parcel of land of the plaintiff's lying in *Old Field*, which he declares to be bounded in a different manner from the acre set out in the plea.

The defendants in their rejoinder say that as to all the trespasses in the said acre of land new assigned, except the breaking and entering into the acre of land new assigned, and treading down and consuming with their feet in walking the grass there growing and treading down and consuming with ninety parcels of the cattle in the declaration mentioned, other trespasses were growing, they are not guilty. And as to this residue

In pleading a common of pasture, it is not necessary to allege in express terms whether it be common appurtenant, or in gross: but the Court will judge of it from the nature of the right claimed. — Common of pasture, without land, may be parcel of a manor, tho' demised and demisable by copy of court roll; and if it be claimed by the lord of a manor in the soil of another for a certain number of cattle, without regard to levancy and couchancy, and be not claimed as incident to arable land, it will be taken to be common appurtenant.

1741, 2,



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GRAVE
against
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The objection set forth in the demurrer amounts to no more than this, that it does not sufficiently appear whether it be common appendant, common appurtenant, or common in gross, or what other sort of right of common it is; and if there were no other objection, we think that this admits of a plain answer.

It cannot be any other sort of common, because there are no other sorts of common of pasture but these three specified in the demurrer. For though common of vicinage has been mentioned, which is sometimes reckoned amongst the rights of common, there is properly no such right of common, but it is only an excuse for a trespass. If it were a right, it would prevent an enclosure, which (it has always been holden that, it will not. Vide *Co. Lit.* 122. a. (a).

The only question therefore is, if it sufficiently appears in the plea whether this be a right of common appendant, appurtenant, or in gross; and we think that it plainly appears to be common appurtenant.

It cannot be common appendant, because that can only be had to arable land; as is held in *Co. Lit.* 122. a. (b). It is of common right, and must be claimed in the waste of the lord. It is not for a certain number of cattle, but only for such as are levant and couchant on the land; and therefore it cannot be severed, nor even for a moment, nor turned into common in gross. And the foundation of this right is that when a lord grants to his tenant arable land, he must have cattle to plough it, he must have cattle to manure it; and if he has only arable land, he must keep his cattle somewhere whilst the corn is growing, and therefore of common right if the lord hath any waste, he may keep his cattle there. This therefore cannot be common appendant. 1st, Because it is not claimed as incident to arable land, but to the manor of *Wentworth*.

2dly, Because it is for a certain number of sheep, and not for such only as are levant and couchant.

(a) Per Powell J. in *Bromfield v. Kerber*, 11 Mod. 73. And by such law the common for cause of vicinage is gone. *Smith v. Horu* and *Redman* &c. cited in 4 Co. 38. b.; and 1 Rol. Abr. 399. K. pl. 3.

(b) See also *Bennet v. Reeve*, Mich. 14 Geo. 2. B. C. sup. 227.

, Because it is not claimed by a tenant in the waste of 1741, 2.
 1, but by the lord himself in another man's soil.

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against
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, Because, as it is laid to be demised and demisable time
 mind, it must have been enjoyed separately from the
 and consequently from the estate to which it is said to
 which common appendant cannot.

is said by my Brother *Draper*, and it is certainly true,
 distinction is ever made in pleadings between common
 nt and appurtenant, but the word "pertinent" is always
 e of, and so it appears only from the nature of the
 1 which is pleaded whether it be common appendant or
 ant (*a*); as we think it plainly does in the present case.
 not be common in gross, because it is pleaded to be par-
 ie manor, which common in gross cannot be (*b*).

ist therefore be common appurtenant; and so we think
 re is no weight in the objection which is set forth in
 rurrer.

here was another objection made at the bar, which
 d us a good deal more, and which we thought at first
 sicult to be got over: but upon further consideration we
 at this likewise will receive a plain answer.

objection is that this common cannot be parcel of the
 and yet be demised and demisable by copy of court
 cause as soon as it is once severed by such demise and
 by itself without any land with it, it ceases to be part
 nanor and so can never afterwards be granted again by
 ecause nothing can be granted by copy but what is par-
 ie manor. This is the strength of the objection.

is it was answered that not only common but several
 ings merely incorporeal may be granted by copy of court
 id several cases were cited to this purpose. In *Co. Lit.*
 : is said that the herbage or vesture of land, underwoods,
 tever concerneth lands and tenements may be granted
 / of court roll. And he goes farther and says that a

1. 4 Co. 38.

1. *Day v. Spence*, Sir Wm. Jon. 375; and *Cro. Car.* 438.

1741, 2. fair or market appendant to a manor may be granted by copy. In 1 *Rol. Abr.* 498, *A. pl.* 1. it is expressly said that tithes may be granted by copy of court roll (a): and though the contrary seems to have been determined in the case of *Sands v. Dray Cro. Eliz.* 814, yet that case when considered is a case of no great authority as to this point; first, because the Judges there were divided in their opinion as to this; for though they all agreed in the judgment, some of them went upon another reason, because it was not found in the special verdict that the tithes were demised by copy time out of mind; and *Popham J.*, who held that tithes were not demisable by copy went upon this reason, that they could not be parcel of a manor, which I shew by and by to be a mistake and that they may be parcel of a manor; and if so, his reason fails: and they all in that case agreed that common and prima vestura prati might be granted by copy. In the case of *Hoe v. Taylor, Moor* 355. it is held that underwood, tithes, a market, or piscary, may be granted by copy of court roll, if the custom will warrant it; and it is said there that the market of *Crockham* or *Crokenhorn* in the county of *Somerset* has always been granted by copy. And the same is said in the same case, as reported in 4 *Co.* 30. b. 31. a.

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I own that when these cases were first cited, I thought they only meant that when copyhold land, to which common or any other profit is appurtenant, was granted by copy, the common or other thing appurtenant will pass with the land; and taking them in this sense, the cases cited would not at all help the present case, because here no land is granted, but only a right of common. But upon looking into the cases and considering them, I find that they go farther, and that the meaning of them all is that common, tithes, and the other things, may pass by copy of court roll by themselves without any lands.

What my Brother *Draper* said the last time plainly sheweth how this may be, and has removed all the doubts that were in relation to this matter. For, as we are upon a demurrer, this right of common as pleaded can be good upon any supposition whatsoever, we must take it to be so. Now supposing it to be, as my Brother *Draper* suggested, that *Old Field* was

(a) Vid. *Hargr. Co. Lit.* 58. b. 7. 9.

part of the manor, and that the lord time before memory 1741, 2. ed away *Old Field*, reserving common of pasture therein 60 sheep, this right, so reserved, will certainly remain 1 of the manor; as if the lord grant away his demesnes iving a rent, this rent is undoubtedly parcel of the manor, held in 2 *Rol. Abr.* 120. *pl.* 4. who cites for this an old in 22 *Aff.* 53. Nay, that book goes still farther; for in same page, *pl.* 2. and 3. it is expressly held that seek rent be parcel of a manor; as if the lord by his deed, whereby serves the rent, or by a deed subsequent, release all the ser- to the tenants, in which case the rent will undoubtedly the rent seek, yet it is parcel of the manor; for which also has the same book of assize, and also 31 *Aff.* 23, which is much stronger than the present.

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GRAVE
against
CAVE.

taking it therefore that this common may be parcel of the or, there is but one difficulty remaining, how it can be de- ble by copy after it has been once so demised, because such the severs it from the manor, and turns it into a common in s; and so it ceases to be parcel of the manor, and if it ad to be parcel of the manor, it can never be demisable a by copy. But there is a plain answer to this when the te of the case is thoroughly considered. For if the lord by mon law grant had demised this common for years, though if been holden as common in gross during the term, after nd of the term it would be common appurtenant and parcel e manor again. And every copyhold, though of inheri- is in the eye of the law considered only as a tenancy at and consequently a much less estate than that of a term of e. Though therefore it should be taken to be in gross dur- the estate of the copyholder, as soon as it comes again into ands of the lord, it is common appurtenant again, and el of the manor as before.

his answer, if there were no other, would be sufficient to ve the objection. But I think that the matter may be ed still farther, and that it is common appurtenant even t it is enjoyed by the copyholder, for the same reason as old lands are always considered in point of law as part of and

olution of the monasteries and was afterwards granted to a subject, these tithes still remain parcel of the manor, and, if the custom will warrant it, may for the same reason be granted by copy of court roll. So a fair or a market may be granted by copy, because a grant by copy at the will of the lord according to the custom of the manor does not destroy the appendancy; but they remain still parcel of or appendant to the manor, notwithstanding such grant.

We think therefore that all the objections to this plea have received an answer.

We did not consult my Brother *Fortescue A.*, because he was not here when the case was argued: but my Brothers *Parker* and *Burnett* agree with me, for the reasons which I have stated, that the plea is good, and that judgment must be given for the defendants."

(a) See *Doe. d. Gibbons Bart. v. Pott*, Dougl. 709; and *Ree. d. Haigh v. Pott*, 6 D. & E. 708.

1741, 2.



PARK-
HURST
against
SMITH
Lessee of
DORMER;
in Error.

behooof of *Robert Dormer* (a). second son of the said *J. D.* and his assigns for and during the term of ninety-nine ye the said *Robert Dormer* should so long happen to live; and and after the death of the said *Robert Dormer* or other soon termination of the estate herein limited to the said *Robert D.* for ninety-nine years as aforesaid then to and for the ul behoof of the said Sir *Robert Jenkinson* and Sir *William* and their heirs for and during the natural life of the said *R. Dormer*, upon trust and confidence to support and preserv contingent remainders uses and estates hereinafter limited being defeated or destroyed, and for that purpose to make or as occasion should require, nevertheless to permit the said *R. Dormer* and his assigns to take the rents issues and profits th during the term of his natural life; and after the end or sooner determination of the said term then to the use and be of the first son and issue male of the body of the said *R. Dormer* lawfully begotten, and to the heirs male of the bo such first son lawfully issuing; and for default of such iss to the use of all and every other son and sons of the *Robert Dormer* severally and successively in tail male;

Remainder to *Fleetwood Dormer*, younger son of the *John Dormer*, and to trustees to preserve contingent remain remainder to his first and other sons in the same manner same is limited in the case of *Robert Dormer*;

Remainder to all and every other son and sons of the *John Dormer*, severally and successively in tail;

Remainder to the said *John Dormer* and the heirs male body;

Remainder to *Peter Dormer*, brother of the said *John D.* and his assigns for ninety-nine years, if he should so long remainder to trustees to preserve contingent remainders: mainder to his first and other sons in tail male;

With the like remainder to *Fleetwood Dormer*, another br of the said *John Dormer*, and his assigns for ninety-nine; if he should so long live, and to trustees to preserve conti remainders, and to his first and other sons in tail male;

Remainder to *Bennet Dormer*, son and heir of *Euseby D.* deceased, who was the brother of the said *John Dormer*, a

(a) Late one of the Justices of the Court of Common Pleas.

gns for ninety-nine years, if he should so long live; re- 1741 2.
nder to trustees to preserve contingent remainders; re-
nder to the first and other sons of *Bennet Dormer* in tail
le; and for default of such issue,

Then "to the use and behoof of *Euseby Dormer*, brother of
said *Bennet Dormer*, and nephew of the said *John Dormer*,
and during the term of ninety-nine years, if the said *Euseby*
rmer should so long happen to live; and from and after the
sh of the said *Euseby Dormer*, or other sooner determination
the estate herein limited to the said *Euseby Dormer* for
ety-nine years as aforesaid, to and for the use of the said Sir
bert Jenkinson and Sir *William Child* and their heirs for and
ing the natural life of the said *Euseby Dormer*, upon trust to
port and preserve the contingent remainders uses and estates
inafter limited from being defeated or destroyed, and for
le purpose to make entries as occasion should require; and for
els to permit and suffer the said *Euseby Dormer* to receive the
its issues and profits thereof to his own use during the term
his natural life; and after the end or other sooner determi-
ion of the said term then to the use and behoof of the first
i of the body of the said *Euseby Dormer* lawfully begotten
l of the heirs male of the body of such first son lawfully
otten; and for want of such issue," to the use of every
er son and sons of the said *Euseby Dormer*, severally and
cessively in tail male, &c; with an ultimate remainder to
: said *John Dormer* in fee.

PARK-
HURST
against
SMITH
Lessee of
DORMER;
in Error.

On the 1st of *October* 1662 the marriage between Sir *J.*
rmer and *S. Browne* took effect; and in *Michaelmas* term
Cap. 2. a recovery was suffered to the uses of the feoffment.
In *Easter* term 1726, 12 *Geo.* 2., the said *Robert Dormer*,
so was then possessed of the premises in question under the
ove settlement for ninety-nine years determinable on his life,
l the preceding limitations in the settlement being determi-
d), and *Fleetwood* his only son levied a fine, and in the same
m they suffered a recovery to the use of the said *Robert*
rmer in fee.

Afterwards in the lifetime of *Robert* (22d of *June* 1726) the
l *Fleetwood* his only son died without issue.

On

ous opinion of the Judges was 1741, 2.

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tlement dated 13th of August

ion frequently to have recourse

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depends.

made by *John Dormer* father of the late
on the marriage of his eldest son Sir *John*
several limitations in favor of Sir *J. Dormer*
the estate in question is limited to the use of
Robert Dormer (second son of the grantor)
the term of ninety-nine years, if he should so
; and from and after the death of the said
sooner determination of the estate therein li-
Dormer for the term of ninety-nine years,
use of two trustees and their heirs for and
life of the said *R. Dormer*, upon trust and
rt and preserve the contingent remainders
inafter limited from being defeated or de-
urpose to make entries as occasion should
to permit the said *R. Dormer* and his assigns
lues and profits thereof during the term of
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o the use of the first son and issue male of
Robert lawfully begotten, and to the heirs
such first son lawfully issuing; and for de-
the use of all and every other son and sons
er severally and successively in tail male :"
itations in like manner to another son and
id *John Dormer*. There is a limitation to
er of the lessor of the plaintiff, and his issue
same words as in the limitation before to

Mr.

PARK-
HURST
against
Lessee of
DORMER
in Error.

1741, 2.

Hil. 15 G.
2. Friday,
Feb. 12th.

Venue
changed,
after an or-
der for time
to plead.

ROWLEY *against* ALLEN (a).

“**M**OTION to change a venue after a rule obtained from a Judge for further time to plead, but before an order for time to plead.

All the officers of this court certified that it had been the constant practice of the Court never to change the venue on application for time to plead and a rule or a Judge's order obtained for that purpose. That it had been so determined and over again, (of which they gave several instances) and it had been ruled several times that after taking out a summons for time to plead, the party so applying should at liberty afterwards to move to change the venue.

But my Brother *Parker* and I thought this a most unreasonable practice, and the rather because it was alleged, (on inquiring of the Judges of the King's Bench I find the story to be true,) that in that court they always allow the defendant to move to change the venue at any time before a plea is taken. And as the rule stands in this court, it is a great hardship on the defendant; for if he lives at the distance of two or three miles the plaintiff may bring his action in *Middlesex* (before the attorney can have instructions from his client) to change the venue the time for pleading will be out; and when he applies for further time, he is then, it seems, too late to move for such a motion, which is most absurd and unreasonable.

However we thought ourselves bound by the present practice until we made a rule to alter it, but resolved to make such a

(a) Vid. *Dennis v. Fletcher*, Barnes 489. S. P.

(b) But the distinction that now prevails obviates this inconvenience. The distinction is this; The venue may be changed after an order for time to plead though upon the terms of pleading issuable; but not after an order for time to plead, where the terms are to plead issuable and take short notice at the first sittings in London or Middlesex, because there a trial would be had. See *Peto v. Luckley*, 511. See also *Linn v. Clegg*, and *Smith v. Gray*, 493; and *Stapley v. Casper*, 7 D. & E. 693.

MUSGRAVE *against* THOMAS GAVE and
THOMAS FRANKLYN.

1741, 2.

Friday,
Feb. 24th.

The opinion of the Court was delivered, as follows, by

Lord Chief Justice. "Trespass. The declaration is that the defendants on the 1st of May 1738 and at other times between that day and the second of October broke and entered the plaintiff's close, viz. one acre of *Wentworth* in the *Isle of Ely* in a field there called the *Old Field*, and trod down and consumed with their feet in walking the plaintiff's grass there growing, to the value of 40s., and trod down and consumed other grass of the plaintiff's growing with cattle, viz. horses, mares, geldings, bulls, swine, hogs, and sheep, to the value of 100l.; et alia enormiter. To the plaintiff's damage of 10l.

The defendants to the force and arms &c plead not guilty; as to the rest of the trespasses say that the place in which the trespasses were done was one acre of land in the said field called *Old Field* in *Wentworth*, abutting as is described in the declaration and that the same is and at the times when &c was the freehold of the defendant *Cave*; so he and the other defendant say that they justify the trespasses laid in the declaration as being the freehold of the defendant *Cave*.

The plaintiff in his replication makes a new assignment, and says that the trespasses laid in the declaration were done in one part of the plaintiff's lying in *Old Field*, which he declares to be bounded in a different manner from the acre set out in the plea.

The defendants in their rejoinder say that as to all the trespasses in the said acre of land new assigned, except the breaking and entering into the acre of land new assigned, and treading down and consuming with their feet in walking the grass there growing, and eating up treading down and consuming with ninety nine parts of the cattle in the declaration mentioned, other than the plaintiff's growing, they are not guilty. And as to this residue

In pleading a common of pasture, it is not necessary to allege in express terms whether it be common appurtenant, or in gross: but the Court will judge of it from the nature of the right claimed.—Common of pasture, without land, may be parcel of a manor, tho' demised and demisable by copy of court roll; and if it be claimed by the lord of a manor in the soil of another for a certain number of cattle, without regard to levancy and couchancy, and be not claimed as incident to arable land, it will be taken to be common appurtenant.

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PARK-
HURST.
against
SMITH
Lessee of
DORMER;
In Error.

case none of the brothers or sisters of the grantor or of their children were living immediately or after the expiry of the term to his brothers and sisters in tail male, and in default of such issue remainder to the lessor of the plaintiff. There were sisters living, and a child of one of the brothers, and so adjudged that the remainder could not take place. Certainly the limitation to the brothers and sisters in that case, after they were all dead, was absurd and ridiculous: but this did not at all turn upon that, but as the remainder-man would take nothing till the brothers and sisters were all dead, and children and some of them were then living, nothing was plain than that the remainder-man could take nothing till deaths. I beg leave only to put one case to shew the absurdity of this notion, and then shall conclude this point. Suppose should grant an estate to *B.* during his life, remainder to *C.* during the lives of *B.* and *D.* or the survivor of them, would one say the remainder would be void because he would not take during the life of *B.*; there being an estate before limited to him during his life? But he would certainly have an estate after *B.*'s death during the life of *D.*, if he survived. If what is contended for by the appellants be right, he would take, but the remainder would be void. For these reasons I am of opinion that the estate limited to the first son of *Eusebius* is good in its first creation.

As to the second point, it depends on two questions;

1st, Whether the freehold were in the trustees at the time the fine?

2dly, If it were, whether notwithstanding this the fine did make a good tenant to the precipe?

To shew that the freehold was not in the trustees, the counsel for the appellants insisted on three things;

1st, That the estate limited to the trustees is void.

2dly, That if it were not void, it was but a contingent remainder and so not vested.

3dly, That in their opinion it was no estate at all, but a right of entry.

The first objection was founded on these, whereby the estate is limited to them after the death of *Robert* during his life, and may receive this plain answer, that if it were limited

on no other contingency, it would certainly be so, but as limited likewise upon any other sooner determination of the ; and the estate may determine by three other ways, by tion of time, surrender, or forfeiture, it is certainly good, determine either of these three ways.

1741, 2.
PARK-
HURST.
against
SMITH
Lessee of
DORMER;
In Error.

to the second objection that the trustees had only a contingent remainder, and consequently that it was not vested at the of this fine levied, it deserves a little more consideration. strength of the argument is this. A contingent remainder not vest till the contingency happens, but in the mean time state vests either in the heir or the next remainder-man.—

is a contingent remainder, and the contingency had not ned at the time of the fine levied, consequently the der was either in *Robert Dormer* as heir of the body of *John*, hom there is a limitation in the settlement,) or in *Fleetwood* a next remainder-man, and if it were in either it must be d that the fine was well levied, and made a good tenant to recipe. We admit all these positions but one, but it is that one that the whole depends, and that is, we deny that state so limited to the trustees was such a contingent remainder it did not vest immediately. The notion of a contingent remainder is a matter of a good deal of nicety, and if I should trou- u with all that is said in the books concerning contingent nders and the instances that are put of such contingent re- ders I am afraid it would rather tend to puzzle than enlighten ase. I choose therefore to tell your Lordships what are the ngent remainders that do not vest, and what remainders vest diately, though they are sometimes (though very impro-) called contingent remainders. The definition which was by the counsel for the appellants of a contingent remainder does not vest is “where the particular estate may deter- before the remainder can take place in possession, and that uncertain when it will take place in possession and it may n that it never will take place in possession, the remainder ot vest.” But this is not a just definition; for if this were it would overturn all the settlements that ever were made.

mention but one instance, though I might mention a and ; as where an estate is limited to *A.* for his life, remain- another and the heirs of his body ; I believe no man in his ever doubted but this was a vested remainder; and yet it

1741, 2.

Hil. 15 G.
2. Friday,
Feb. 12th.

Venue
changed,
after an or-
der for time
to plead.

ROWLEY *against* ALLEN (a).

“**M**OTION to change a venue after a rule obtained from a Judge for further time to plead, but before any plea pleaded.

All the officers of this court certified that it had been the constant practice of the Court never to change the venue after an application for time to plead and a rule or a Judge's order obtained for that purpose. That it had been so determined ~~and~~ and over again, (of which they gave several instances) ~~say that~~ it had been ruled several times that after taking out a Judge's summons for time to plead, the party so applying ~~should not be~~ at liberty afterwards to move to change the venue.

But my Brother *Parker* and I thought this a most unreasonable practice, and the rather because it was alleged, (and upon inquiring of the Judges of the King's Bench I find the allegation to be true,) that in that court they always allow the defendant to move to change the venue at any time before a plea pleaded. And as the rule stands in this court, it is a great hardship on a defendant; for if he lives at the distance of two or three hundred miles the plaintiff may bring his action in *Middlesex* (b), and before the attorney can have instructions from his client to move to change the venue the time for pleading will be out; and if he applies for further time, he is then, it seems, too late to make such a motion, which is most absurd and unreasonable.

However we thought ourselves bound by the present practice until we made a rule to alter it, but resolved to make such rule.”

(a) Vid. *Dennis v. Fletcher*, Barnes 489. S. P.

(b) But the distinction that now prevails obviates this inconvenience. “The distinction is this; The venue may be changed after an order for time to plead though upon the terms of pleading issuable; but not after an order for time to plead, where the terms are to plead issuable and take short notice of trial at the first sittings in London or Middlesex, because there a trial would be held.” *Perry v. Litchley*, 511. See also *Harner v. Grey*, and *Smith v. Grey*, Ben 240 493; and *Shiple v. Cooper*, 7 D. & E. 693.

the statute of Uses; so that during that time we have been in the dark; and this new light is but just sprung up, which prevail for another reason as well as this, will overturn the settlements for 200 years last past. For in every one of the limitation is either in the same words as the present, *for the end or other sooner determination of the particular estate* which are words tantamount to this; for *end or determination* only comprehends *death as well as effluxion of time*. If therefore I could not make this consistent with the rules of law, though I humbly apprehend I plainly have, I should choose to put a construction on these words contrary to the law, than overturn many thousand settlements, according to this maxim founded on the best reason, *communis error jus, and ut res magis valeat quam pereat*. But the present for the reasons I have already mentioned is not; I think, to this objection; to prove which I beg leave only to put *case*. *A.* tenant in fee grants an estate to *B.* for 99 years terminable on his life; supposing *B.* outlive the term, or survive, or forfeit, no one I believe will say but that *A.* may enjoy the estate again. If so a contingent freehold was in him during the life of *B.*; for it could not be in *B.*, because he had a chattel interest; and it could not be in any one else. If it were in *A.*, it must be a vested interest, for it was never in him. And if *A.* had a contingent freehold during the life of *B.*, no one can say but that he might grant it over, and so it must be of the same nature it was when it was in *A.* and consequently a vested freehold. And this case I have expressly held to be law in *Co. Lit.* 42. a. in *Cholmley's Case*. 51. a., and in the Year Book of *Edw.* 3. which is cited. I shall conclude this head with the case of *Elie v. 2 Vern.* 754, which was cited as an authority by the courts. It was cited by them to prove that if such trustees with the tenant for years and the next in remainder to other remainders, it was not a breach of trust: but as to this it is but a slender authority; 1st, Because though Lord was a very great man, other Chancellors as great as he have been of another opinion. 2dly, Because in this case there was no remainder but to the heirs of the body of the tenant for years and to his own right heirs, and a fine only by him with trustees would have barred them by way of estoppel.

1741, 2.
PARK-
HURST.
against
SMITH
Lessee of
DORMER.

1741, 2.

Hil. 15 G.
2. Friday,
Feb. 12th.

Venue
changed,
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ROWLEY *against* ALLEN (a).

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MUSGRAVE *against* THOMAS GAVE and
THOMAS FRANKLYN.

1741, 2.
Friday,
Feb. 18th.

pinion of the Court was delivered, as follows, by

Lord Chief Justice. "Trespafs. The declaration
at the defendants on the 1st of May 1738 and at
times between that day and the second of October
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ntworth in the *Iste of Ely* in a field there called the
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Ps grafs there growing, to the value of 40s., and
down and consumed other grafs of the plaintiff's
ring with cattle, viz. horses, mares, geldings, bulls,
hogs, and sheep, to the value of 100l.; et alia enor-
To the plaintiff's damage of 10l.

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o the rest of the trespafs say that the place in which
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that the same is and at the times when &c was the
the defendant *Cave* ; so he and the other defendant
justify the trespafs laid in the declaration as being
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roll ; and if
it be claimed
by the lord
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the soil of
another for a
certain num-
ber of cattle,
without re-
gard to le-
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couchancy,
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incident to
arable land,
it will be
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1741, 2.

Hil. 15 G.
2. Friday,
Feb. 12th.

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ROWLEY *against* ALLEN (a).

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But my Brother *Parker* and I thought this a most unreasonable practice, and the rather because it was alleged, (and upon inquiring of the Judges of the King's Bench I find the allegation to be true,) that in that court they always allow the defendant to move to change the venue at any time before a plea pleaded. And as the rule stands in this court, it is a great hardship on a defendant; for if he lives at the distance of two or three hundred miles the plaintiff may bring his action in *Middlesex* (b), and before the attorney can have instructions from his client to move to change the venue the time for pleading will be out; and if he applies for further time, he is then, it seems, too late to make such a motion, which is most absurd and unreasonable.

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AS MUSGRAVE *against* THOMAS GAVE and
THOMAS FRANKLYN.

1741, 2.

Friday,
Feb. 14th.

Opinion of the Court was delivered, as follows, by

Lord Chief Justice. "Trespass. The declaration is that the defendants on the 1st of *May* 1738 and at other times between that day and the second of *October* broke and entered the plaintiff's close, viz. one acre of *Wentworth* in the *Isle of Ely* in a field there called the *Old Field*, and trod down and consumed with their feet in walking the plaintiff's grass there growing, to the value of 40s., and trod down and consumed other grass of the plaintiff's growing with cattle, viz. horses, mares, geldings, bulls, swine, hogs, and sheep, to the value of 100l.; et alia enormia. To the plaintiff's damage of 10l.

Defendants to the force and arms &c plead not guilty;

As to the rest of the trespasses say that the place in which the trespasses were done was one acre of land in the said field called *Old Field* in *Wentworth*, abutting as is described in the declaration and that the same is and at the times when &c was the defendant's; so he and the other defendant say that they justify the trespasses laid in the declaration as being the freehold of the defendant *Cave*.

The plaintiff in his replication makes a new assignment, and says that the trespasses laid in the declaration were done in one part of the plaintiff's lying in *Old Field*, which he does not say to be bounded in a different manner from the acre set out in the plea.

As to the defendants in their rejoinder say that as to all the trespasses in the said acre of land new assigned, except the breaking into the acre of land new assigned, and treading down and consuming with their feet in walking the grass there growing, and eating up treading down and consuming with ninety parcels of the cattle in the declaration mentioned, other trespasses growing, they are not guilty. And as to this residue

In pleading a common of pasture, it is not necessary to allege in express terms whether it be common appurtenant, appendant, or in gross: but the Court will judge of it from the nature of the right claimed.—Common of pasture, without land, may be parcel of a manor, though demised and demisable by copy of court roll; and if it be claimed by the lord of a manor in the soil of another for a certain number of cattle, without regard to levancy and couchancy, and be not claimed as incident to arable land, it will be taken to be common appurtenant.

1741, 2.

Hil. 15 G.
2. Friday,
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ROWLEY *against* ALLEN (a).

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MAS MUSGRAVE *against* THOMAS GAVE and
THOMAS FRANKLYN.

1741, 2.

Friday,
Feb. 12th.

THE opinion of the Court was delivered, as follows, by

his Lord Chief Justice. "Trespafs. The declaration sheweth that the defendants on the 1st of *May* 1738 and at other times between that day and the second of *October* 1738 broke and entered the plaintiff's close, viz. one acre of *Wentworth* in the *Isle of Ely* in a field there called the *Old Field*, and trod down and consumed with their feet in walking the plaintiff's grafs there growing, to the value of 40s., and trod down and consumed other grafs of the plaintiff's growing with cattle, viz. horses, mares, geldings, bulls, swine, hogs, and sheep, to the value of 100l.; et alia enormiter. To the plaintiff's damage of 10l.

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And as to the rest of the trespafs say that the place in which the times when &c was one acre of land in the said field called *Old Field* in *Wentworth*, abutting as is described in the declaration and that the same is and at the times when &c was the land of the defendant *Cave*; so he and the other defendant cannot right justify the trespafs laid in the declaration as being on the freehold of the defendant *Cave*.

The plaintiff in his replication makes a new assignment, and sheweth that the trespafses laid in the declaration were done in one parcel of land of the plaintiff's lying in *Old Field*, which he sheweth to be bounded in a different manner from the acre set out in the plea.

And as to this the defendants in their rejoinder say that as to all the trespafses in the said acre of land new assigned, except the breaking and entering into the acre of land new assigned, and treading down and consuming with their feet in walking the grafs there growing and eating up treading down and consuming with ninety parcels of the cattle in the declaration mentioned, other than here growing, they are not guilty. And as to this residue

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1742.

DAVIS
against
LEES.

good, the demandant should have said that the tenant was in possession of the lands demanded *and of no other in the same vill of Barlow*; which she has not done. The rule in 2 *Rel. Abr.* 730. Letter (I.) mentioned in the argument is certainly a right one, that where the jurors ought to have a view the party shall not have one: but it does not extend to the present case, for it extends only to such actions where a view is demandable of right, as in the case of an affize de novel disseisin, affize de nuisance, and an action of waste. But notwithstanding the late statute 4 & 5 *An. c.* 16. it is merely discretionary in the Court in a formedon whether the jurors shall have a view or not, according to the circumstances of the case, and therefore this is no reason to deny the party a view.

The judgment therefore of the Court is that, notwithstanding the counterplea of the demandant, the tenant must have a view."

T. 16 G. 2.
Wednesday,
July 7th.

DANIEL GINGER on the Demise of JOHN WHITE
against ELIZABETH WHITE.

Devise to A. for life, then to the children of A. successively and their heirs, and if A. die without issue then to B. (son of the elder brother of A.) in fee; held that A. only took an estate for life.

THE following opinion of the Court was given by

Willes, Lord Chief Justice. "This comes before the Court (a) on a case reserved by my late Brother *Denton* at the assizes for the county of *Surry*, 24th of *March* 9 *Geo.* 2.

The case is thus; *John White*, the elder, grandfather of the plaintiff, being seised in fee of the premises in question, and having two sons and one daughter, *Henry*, *John* and *Sarah*, made his will on the 20th of *December* 1706 in these words; after a devise to his wife for her life of a part of his house, he gives

(a) This case was argued at five several times; after the two first arguments which took place in *Easter* and *Michaelmas* terms 1737, the Court were about to give judgment in favour of the defendant; but on the day when the Chief Justice intended to have given that opinion, he began to entertain a doubt whether *John* the son took more than an estate for life; he accordingly deferred giving judgment then, and the case was afterwards argued in *Easter* term 1739, in *Michaelmas* term 1740, and in *Michaelmas* term 1741, and judgment was not given until *July* 1742.

"the

1742.

GINGER.
dem.
WHITE
against
WHITE.

the same with the appurtenances and that part which he had given to his wife after her decease unto his son *John* for his life and to his daughter *Sarah* for her life in case she shall live unmarried in common between them, but in case the said *Sarah* shall marry or die before *John*, then in either of the said cases the said *John* shall have the sole use of the house for his life, and from and after the decease of the said *John* and *Sarah* or other determination of their estate therein he wills and devises the said house to the male children of the said *John* successively one after another as they are in priority of age and to their heirs; and in default of such male children he gives the same to the female children of the said *John* and their heirs; and in case the said *John* shall die without issue, then he wills and devises the house and premises to his grandson *John White* his heirs and assigns for ever.

John White the son had no issue at the time of making the will, nor since. On the death of the testator *John* and *Sarah* entered and enjoyed the premises according to the will. *Sarah* is since dead, and *John* survived her, and on her death entered and enjoyed the whole premises in question according to the will; and after her death (and that of the testator's wife) by indentures of lease and release dated 9th and 10th of *January* 1718 he conveyed the premises in question to *John Steer* and his heirs to make him tenant to the freehold in order to suffer a common recovery, and declared the uses to himself and his heirs, and afterwards a recovery with double voucher was duly suffered; and afterwards *John* settled the premises on the defendant *Elizabeth* his wife and her heirs. *John* the son died about a year ago without issue. *Henry* the eldest son of the testator is still living; and his son *John* the grandson and devisee of *John White* the elder is the lessor of the plaintiff.

The question reserved is whether *John* the son took by the will an estate-tail, and so had a power to suffer a recovery and thereby to bar the remainder to *John* the grandson, or whether he was only tenant for life.

This is the general question: but it will depend upon two points,

1st, Whether he took an immediate estate tail by the devise to his male and female children;

2dly,

1742.
GINGER
dem.
WHITE
against
WHITE.

2dly, If he did not, whether or no these words "Iac said *John* shall die without issue" did not give him an tail by implication in remainder after the limitation to his dren; for in either case the recovery would bar *John* the because he claims by the subsequent devise "in case *John* uncle died without issue."

As the question arises upon the construction of the will, consider in the first place (as I will always do in cases of this kind) what was the intent and meaning of the testator; because the intent of the testator be plain and clear, though to be proved, cannot take place if it be inconsistent with the rules of law. I will always endeavour, if I possibly can, that the intent of the testator may take effect, and will never take pains to find little niceties in the law to defeat the intent of the testator. It is an excellent rule in the construction both of deeds and of wills, *ut verba intentioni, et non è contrà debent inservire*. Now I am upon this general topic, before I enter upon the particulars of the present case, I beg leave to take notice of a mistake (for so I think it to be) which has occasioned more confusion in respect to the construction of wills than any other whatsoever.

What I mean is that a notion has prevailed that such particular words in a will are as much technical (or) words as others in a deed, and as necessarily pass such an estate in a will as

(a) In *Doe d. Comberbach v. Perryn*, 3 D. & E. 490, 1, Lord Kaye Justice said "There is no doubt but that formal words may be controlled by the context of the will: but we ought not to reject the legal meaning of them, unless we are clear that in so doing we give effect to the deviser's intention." giving effect to the intention of the deviser is the rule by which the courts are to proceed in construing wills; and they will put that construction on the will that will best answer the deviser's general intention, though by so doing they may defeat some particular intent inconsistent with it. *Roe d. Dodson v. Grew*, 2 Walf. 323; *Webb v. Puley*, 5 D. & E. 303; *Doe d. Dary v. Burnfall*, 6 D. & E. 361; *Candler v. Smith*, 7 D. & E. 532; *Roe d. Blandford v. Applin*, 4 D. & E. 1; *Doe d. Bran v. Halley*, 8 D. & E. 5; and *Robinson v. Robinson*, 3 Burr. 3, the last of which the devise was "to *L. Robinson* for life and no longer, and his decease to such son as he should have, taking the name of *Robinson*, and for default of issue" then over; and there in order to effectuate the general intent of the deviser it was holden that *L. Robinson* took an estate tail, notwithstanding the words "for life and no longer." And in *Doe v. Applin*, where the devise was "To *A.* for life and after his decease to and amongst his issue, and for default of issue" then over, it was ruled that *A.* took an estate tail, and that the words "to and amongst" be rejected, otherwise the deviser's general intent, which was to prefer the issue to the more distant branches of his family, would be defeated.

a deed; as for instance that the word *issue* or *children*, there are none at the time of the devise, do as necessarily an estate tail in a will as *heirs of the body* do in a deed.

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this I take to be a gross mistake; for why does the word in a will signify the same as *heirs of the body*? Only because it may be supposed that the testator, who was ignorant of the law, intended it should have that construction. It does not *ex vi termini* create an estate tail in a will as "*heirs of the body*" do in a deed, but only where it appears to be the intent of the testator that the word should have that construction or at least that it does not appear that the intent of the testator was otherwise.

In order therefore to find out what construction is to be put upon the words of a will, we ought in the first place to consider the intent of the testator is, though this I am afraid is too late the last thing that is thought of. But the Court of King's Bench in the case of *Law v. Davies* (a) M. 3 Geo. 2. laid so much stress upon this, and upon the notion which I have now mentioned to establish that they determined upon the first argument that even the words "*heirs of the body*" should not pass an estate tail in a will, because it plainly appeared to be the intent of the testator that they should not; for after the words "*heirs of the body*" he added these words "that is to say, his second, and every other son." Mr. J. Reynolds was pleased upon that occasion "Shall not a man be allowed to speak his mind in his will?" Surely a man ought to be allowed to do so, yet if we consider how miserably some wills have been construed, we may fairly say that this is a privilege that is not allowed to testators.

Having premised this in general, I come now to consider the particular words of this will. And I think that the testator's meaning is as plain as possible, that *John* his second son should have an estate for life, that the children of *John* should have an estate in tail general, and that in default of such issue *James* should go to *John* the son of his eldest son in fee.

^(a) Reg. 113; 2 Lord Raym. 1561; 1 Bernard, 238; 2 Str. 849; and 2 C. Abr. 316 pl. 28. S. C.

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Let us see therefore in the next place whether the will, according to the rules of law, will admit of this construction. In the first place I will consider the devise to the *and female children and their heirs*. That by the words "heirs" in both places must be meant "heirs of the body" cannot be denied, because in the first place *the male children* could not have without heirs if any of their sisters were living; and the *children* of *John* the son could not die without heirs if *John* grandson, the son of *Henry* the eldest son of the testator, were living. The testator therefore by the word "heirs" necessarily intend "heirs of their bodies," according to *Nottingham v. Jennings* (a) Tr. 12 W. B. R., which is founded on the case of *Webb v. Hearing*, Cro. Jac. 415, and the case of *Hearn and Allen*, Cro. Car. 57. It had been otherwise if the remainder had been limited over to a stranger (b); for in that case there is nothing to shew that the testator intended by the first words *heirs of the body*; for in that case he could apprehend that a fee-simple might be limited after a stranger, which it cannot be by the rules of law, and therefore limitation to a stranger has always been held to be void; as by two cases in the Year-books 19 Hen. 8. 8. b. and 29. b. in *Dyer* 33, and by many other ancient cases, besides the case of *Crumble v. Jones* (c), adjudged in J. R. Hil. 7.

In my arguing of the present case, I shall therefore take it for granted that the word "heirs" annexed to the children of *John* is to be construed "heirs of bodies."

That the word "children" in a will will sometimes create an estate tail I do not deny; but what I insist on is that as this is penned, according to the rule laid down in *Wild's* case 17. it does not create an estate tail here, and that all the instances in the books where the words "children" and "issue" have been adjudged to make an estate tail in a will are plainly distinguishable from the present case.

(a) Cited in *Preston d. Eagle v. Funnell*. Tr. 12 & 13 Geo. 2. Sep. 166. *Preston v. Funnell*, and the cases there referred to; and *Goodright d. Good* *Goodridge*, Mich. 16 Geo. 2. C. B. post.

(b) See the cases referred to in n. a.

(c) Sup. 167. n. a.

the case of *Wild* is in point: If a devise be to *A.* and children, if there be no children then in being, it gives estate-tail, because the devise is in words de presenti; and being no children in being, they must take by way of reversion. But if a devise be to *A. and after his decease* to children, *A.* has only an estate for life, because then the law plainly shew that the children were intended to take by way of remainder (a). But in the present case it is not only after his decease, but after the determination of the former estate, which plainly shews that the devise to the children is intended as a remainder in the present case. Besides, as all shew more particularly when I come to distinguish it from those cases where the word "children" has been construed to create an estate-tail, there are many more expressions in this devise which plainly shew that the word "children" ought to be construed as a word of purchase and not of limitation.

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The case of *King v. Melling*, reported in 1 Ventr. 225 (b) and the cases there cited to shew that the words "issue" "children" have been sometimes construed so as to create an estate-tail, do not come up to the present case. The next case is that which he cites out of *Moor* 397. of a devise by *A.* to his son for life, and after his decease to the children of his body, which was held to be an estate-tail. It indeed seems contrary to the judgment in *Wild's* case; it is very different from the present case, and is distinguished by my Lord Hale from *Wild's* case because of the words "children of his body," which are proper words to create an estate-tail and shew that he had an eye to an estate-tail which words are neither in *Wild's* case or in the pre-

In the case of *King v. Melling* itself the devise was to *Bartholomew* for his natural life and after his decease to the issue of *Bartholomew* by a second wife; there were the words of his body, besides the word "issue," which as Lord Hale himself is a much stronger word than children: it is nomen collectivum, and takes in the whole generation (c) vi termini,

Vid. Doe d. *Cooper v. Collis*, 4 D. & E. 294.

2 Lev. 59. S. C.

See also Doe d. *Cooper v. Collis*, 2 D. & E. 299; and *Hay v. The Earl of Arundel*, 3 D. & E. 86.

1742. and in common parlance it is taken to mean heirs of the body (which is the best rule to judge of the construction of words of a will); for it never can be imagined that a testator who is always supposed to be inops concilii, did not intend that his words should be construed in their common sense but that they should be construed in that sense that even lawyers themselves cannot agree upon nor find out the meaning of them till after a long investigation. Besides there are many words in the present devise, which are not in the case *King v. Mellish*, and plainly distinguish it from that as the words "successively, one after another as they are of priority of age," which shew plainly that the testator had in eye to a strict limitation. The words "heirs of such children," which I must construe "*heirs of the body*", afford a much stronger argument. These words are not in either of the cases before mentioned: but they have always been construed to shew that the preceding words do not give an estate-tail. As in *Archer's case* 1 Co. 67. a. the devise to *Robert Archer* for life and to his next heir male and to his heirs male of the body of such heir male; and held that *Robert* took only an estate for life by reason of the addition of these words.

The case of *Clerk v. Day Cro. Eliz.* 313. is exactly to the same purpose; there the words are to *A.* his daughter for life and to the heir of her body and to the heirs of their body begotten; and held that *A.* had only an estate for life.

The only case that has the least resemblance to the case before us is the case of *Legatt v. Sewell* reported in 2 Vern. 551., in several other books. There the words of the will were "To *William Legatt* for life, and after his decease to the heirs male of the body of *William Legatt* and the heirs of the body of every such heir male severally and successively as they should be in priority of birth and seniority of age and for want of such issue," the remainder over. The Chancellor referred it to the Judges of B. C. (a), and the Judges against *Tracy J.* were of opinion that *William Legatt* took an estate-tail; but besides that Mr. *J. Tracy* was a

(a) Vid. 1 P. Wms. 87.

udge and his opinion of great weight (a), that case is different from the present, because the words there are of the body," which vi termini even in a deed would an estate-tail. And I have been informed that the were all of opinion that if the first words had been ' or " children" *William Legatt* would only have had for life; and that they went upon this rule, which I like notice of more particularly by and by, that in the beginning of a will an express estate is given, it may afterwards altered by implication, though it may be by express words: And if they did not go upon this dispute, I know not how to reconcile this case with the case of *v. Davies*. But upon this point it is plainly dis-able, because in this case there are no express sub-words, but there were in the case of *Lew v. Davies*.

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these reasons and upon the strength of these cases I am of opinion that *John* the second son took only an estate for life notwithstanding the devise to his children.

As we see in the next place whether the words "In case of death without issue" give him an estate tail in remainder. I am clearly of opinion that they do not, and I think there are several cases that warrant this opinion, founded upon a law which has never been contradicted in any case, and there is not one case to support the contrary opi-

rule of law that I mean is, that a precedent estate de-
express words cannot be lessened, increased, or altered,
ation (b), though it may be by express words. And this is
in notion, but as it is founded on the best reason, it is
to be law by Lord *Hale* in the case of *King v. Mel-*
and he cites a case for that purpose as old as the 1st and

According to the report of this case in 1 P. Wms. 92. "The Court ap-
e satisfied with the certificate of the three judges directed that an
should be brought in B. R., in order to have the matter settled; but
e parties agreed, and so the question was not determined." But in
aldwin, 2 Ken. 657. Lord Chancellor *Hardwicke*, speaking of this
f the opinion of the three Judges, added "Indeed *Tracy* J. held
upon that Lord *Cowper* seemed to doubt (as I have heard,) but held
and to agree with the three Judges, and so decreed."

d. *Bean v. Halley*, 8 Durnf. & East 5.

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2d Eliz., from *Dyer* 171. Upon this rule the case of *Bam v. Bamfield*, reported in 1 *Salk.* 236, 2 *Vern.* 427, 447, and 1 *P. Wms.* 54. (but best (a) I think in *P. Wms.*) was determined in as solemn a manner as possible by Lord *Kepel Wright*, assisted by three very great judges, *Holt*, *Trentham*, and *Powell*, and *Trevor* then Master of the Rolls. The case as stated in 2 *Vernon* was thus; a devise to *A.* for life, and then to his first and every other son in tail male, and if *A.* die without an heir male of his body begotten, remainder over to another; in *Salk.* it is "without issue male of his body;" in *P. Wms.* "and for want of issue male of *A.*" The devisee for after wards made a codicil, wherein he recited that he had given *A.* an estate tail, as it is reported in *Salkeld*; but, as is reported in *P. Wms.*, that he had given his estate to *A.* and the heirs male of his body; held by the Lord Keeper, the Master of the Rolls, and all the Judges, that *A.* took only an estate for life; and they founded their opinion on this rule, that where an express estate for life is given, it shall not be enlarged to an estate-tail by implication: but they all agreed that if the devise had been to *A.* generally, and if he die without issue of his body then to *B.*, without any intermediate devise between the devise to *A.* and the words "if he die &c," there *A.* should have an estate-tail. They agreed likewise that, if there were a devise to *A.* for life, and then to the issue or heirs of his body, this devise by express words would give *A.* an estate-tail, notwithstanding the express devise to him for life before. They held likewise that the recital in the codicil did not make any alteration for that in common parlance even a strict settlement is entailing an estate.

It has been said that this has been held not to be law. I am sure I have heard it cited above twenty times in the Court of Chancery, and never yet heard it contradicted, and I believe never shall again, except by those persons who know not how to distinguish it (though the distinction is plain and obvious) from some other subsequent cases. See *Mr. Williams*, in his argument in the case of *The Attorney General v. Sutton &c* in the House of Lords, 1 *P. Wms.* 754, where

(a) In the argument of the case of the *Attorney General v. Sutton*, 1 *P. Wms.* 760, Mr. *P. Williams* said that that of *Bamfield v. Popple* was reported in *Salkeld*.

seemed to be a case that made against him, admitted it to be
undoubted law, but plainly distinguished it from that case,
and I shall shew presently when I come to take notice of

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In the case of *Lodington v. Kime*, *Salk.* 224, and 3 *Lev.*
431, where there are exactly the same words as in the pre-
sent case, it is "and if he die without issue male," the
Judges, though they differed in other matters, were all una-
nious that the first taker took only an estate for life, because
the first devise was to him expressly for life: and when it
came afterwards before the House of Lords, they were like-
wise of the same opinion as to this point, and so were all the
Judges who attended there and gave their opinions.

The only cases that seem to thwart this are the case of
King v. Melling; a case there cited, to *A.* and if he die with-
out issue &c; and another, to *A.* for life, and if he die with-
out issue &c; the aforementioned case of *The Attorney Gene-
ral v. Sutton*; the case of *Langley v. Baldwyn*, which is cited
and fully stated in the argument of that case 1 *P. Wms.* 759;
and the case of *Shaw v. Way*, sometimes called by the name
of *Spencer v. Shaw*, first determined on the *Chester* circuit,
then in the King's Bench, and then in the House of Lords.

The case of *King v. Melling* and the two cases there cited
are distinguishable from the present. In the first the devise
was to *A.* for his natural life and after his decease to the issue
of his body by his second wife; so there, though the first de-
vise was to *A.* for life expressly, the following words were
express likewise "to the issue of his body," which word
"issue" in that place was construed to signify the same as
"heirs of his body;" so the rule concerning implication was
not broken through, but admitted by Lord *Hale*, as I said
before. The case where the devise was to *A.* generally is
likewise clearly out of the rule. The other case, where the
devise was to *A.* expressly for life, and if he die without issue
&c. likewise differs widely from the present case, because
there is no intermediate devise to the children, and therefore
the word "issue" must be rejected, if it be not construed
to give *A.* an estate-tail. And this makes a great difference,

1742. as will appear when I come to take notice of the cases *Langley v. Baldwin* and *The Attorney General v. Sutton*: but in the present case the word "issue" need not be rejected but may have a reasonable construction, viz. to mean such issue as he had mentioned before; and it could mean no other for he had devised the estate before to all his sons and daughters.

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In the case of *Langley v. Baldwin* the devise was to be for life, without impeachment of waste, and with power to make a jointure, remainder to the first son in tail male, and so on to the sixth and no farther; and then followed the words "and if *A.* should die without issue male of his body then to *B.* in fee." This case in May 1707 was referred to Lord Chancellor *Coxeter* to the Judges of Common Pleas and they were all of opinion that there being no limitation beyond the sixth son, and for that there might be a seventh who was not intended to be excluded, therefore to let in the seventh and subsequent sons to take, but still to take as if the body of *A.* by descent and not purchase, and he held that the words "if he die without issue male of his body" gave *A.* an estate-tail. But the words there are very different from the words in the present case, the devise there going no farther than the sixth son. Besides I own that I do not like that determination; and I think I could put such a construction on the words as would better answer the intent of the testator, for his intent was as plain as possible that he should only have an estate for life. If the case of *Popham v. Bamfield* indeed were rightly reported in *Salkeld*, who carries the limitation no farther than the tenth son, it would be exactly the same as the case of *Langley v. Baldwin*: but *P. Williams* admits that the limitation there is to the first and every other son, which distinguishes it from the case of *Langley v. Baldwin*: but *P. Williams* admits that the limitation there is to the first and every other son, which distinguishes it from the case of *Langley v. Baldwin*, because there is no occasion to put the same construction on the words "if he die without issue" in order to aid the intent of the testator. And the same reason distinguishes it from the present case where the devise is to all the children of *John*.

There is the same distinction likewise in the case of *The Attorney General v. Sutton*; for there the limitation was no farther than to the second son of *Thomas Sutton*, and yet

House of Lords there determined that *T. S.* took only an estate for life. I own that the Court of Exchequer held contrary, but their decree was reversed by the House of Lords. There the words of the devise were to *T. Sutton* for life, and afterwards to his first son or issue male of his body lawfully to be begotten, and to the heirs male of the body of such first son, remainder to his second son and his heirs male in tail, (as before) going no further than the first son; and then follow these words "that immediately after the death of *T. Sutton* without issue male of his body, the premises should go to trustees for charities (a)."

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As to the case of *Shaw v. Weigh* (b), if the words were the same as in the present case, it is a case of no great authority; for though Mr. J. Couper and *Winnington* were of opinion that it was an estate-tail, the Court of King's Bench was unanimously of opinion that the sisters there took only an estate for life; and though the House of Lords reversed their decree, it was against the opinion of nine Judges against one. Besides the case there was as different from the present as possible, because there the limitation over was to the issue or issues of *her or their bodies* lawfully begotten." The words of that devise were "I give all my estate conveyed in houses &c. to trustees (in the will named) upon trust for my loving sisters *Ann* and *Dorothy* equally betwixt and between them during their natural lives without committing any waste; and if either of my said sisters happen to die leaving issue or issues of *her or their bodies* lawfully begotten or to be begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them and their respective issue or issues; if it shall happen that both my said sisters shall die without issue as aforesaid, and their issue or issues to die without issue or issues lawfully to be begotten, then the said premises to stand and be entrusted to and for my kinsman *John Swijt* and the heirs male of his body lawfully begotten, and for want of such issue then in trust for my son *R. G.* and the heirs male of his body lawfully begotten; and for want of such issue then in trust for the heirs male of *W. R.* lawfully begotten or to be begotten, and for want of such issue then in trust for my godson

See Cox's ed. of *P. Wms.* 1 vol. page 756. note
Fitzg. 7; 8 *Mod.* 253, 382; 1 *Eq. Caf. Abr.* 184. pl. 28; 2 *Str.*
and *Fort.* 58.

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1742. as will appear when I come to take notice of the cases of *Langley v. Baldwyn* and *The Attorney General v. Sutton*: but in the present case the word "issue" need not be rejected, but may have a reasonable construction, viz. to mean such issue as he had mentioned before; and it could mean no other, for he had devised the estate before to all his sons and daughters.

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WHITE.

In the case of *Langley v. Baldwyn* the devise was to *A.* for life, without impeachment of waste, and with power to make a jointure, remainder to the first son in tail male, and so on to the sixth and no farther; and then followed these words "and if *A.* should die without issue male of his body" then to *B.* in fee. This case in May 1707 was referred by Lord Chancellor *Coxeter* to the Judges of Common Pleas; and they were all of opinion that there being no limitation beyond the sixth son, and for that there might be a seventh who was not intended to be excluded, therefore to let in the seventh and subsequent sons to take, but still to take as issue and heirs of the body of *A.* by descent and not purchase, they held that the words "if he die without issue male of his body" gave *A.* an estate-tail. But the words there are very different from the words in the present case, the devise there going no farther than the sixth son. Besides I own that I do not like that determination; and I think I could put such a construction on the words as would better answer the intent of the testator, for his intent was as plain as possible that *A.* should only have an estate for life. If the case of *Popham v. Bamfield* indeed were rightly reported in *Salkeld*, who carries the limitation no farther than the tenth son, it would be exactly the same as the case of *Langley v. Baldwyn*: but *P. Williams* admits that the limitation there is to the first and every other son, which distinguishes it from the case of *Langley v. Baldwyn*: but *P. Williams* admits that the limitation there is to the first and every other son, which distinguishes it from the case of *Langley v. Baldwyn*, because there is no occasion to put the same construction on the words "if he die without issue" in order to aid the intent of the testator. And the same reason distinguishes it from the present case, where the devise is to all the children of *John*.

There is the same distinction likewise in the case of *The Attorney General v. Sutton*; for there the limitation went no farther than to the second son of *Thomas Sutton*, and yet the

used and been accustomed to throw cast and place with
 els spades pickaxes and corves the earth clay stones slates
 slack and other rubbish coming therefrom together in
 & on the land *near to such pits*, such land being customary
 ment and parcel of the manor aforesaid, *there to remain*
continuous, and to cast lay place and continue wood there
 the necessary use of the said pits, and to take and carry
 y from thence with carts waggons and other carriages
 of the said coals so laid and placed there, and to burn
 make into cinders there other part of the said coals so
 and placed there at his and their will and pleasure; and
 yes on to justify under the custom.

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 WILKS.

There was a verdict for the defendant at the last *Yorkshire*
 as.

was moved in the last term by *Prime King's Serjt.*,
old Serjt., and *Agar Serjt.*; to arrest the judgment; a
 nisi was made, and afterwards, *May 24th*, *Willes King's*
t. and *Bootle Serjt.* shewed cause against the rule. It
 arising to be a case of some difficulty, we took time to
 sider of it until this term.

and now I delivered the judgment of the Court (absent
J. Fortescue A.) as follows.

This is in arrest of judgment; and the objection was that
 custom insisted on by the defendant was in point of law
 good custom,
 1st, Because it is uncertain; and
 2^{dy}, Because it is an unreasonable one;

and we are all of opinion with the plaintiff upon both
 as.

1st; That every custom must be certain is laid down as
 rule in all the books, which treat of customs. It is said
 a custom, as by way of definition, that *consuetudo ex*
et rationabili causa privat communem legem. *Davis's*
1. 32. And it must be certain for two plain reasons;

Because if it be not certain, it cannot be proved to have
 a time out of mind; for how can any thing be said to
 been time out of mind when it is not certain what it
 2^{dy}, It must be certain because every custom pre-sup-
 as a grant; and if a grant be not certain, it is void. This
 rule so well established that I shall cite but very few
 authorities

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authorities to support it. It was so holden in *Davis's* 33. 35.; 1 *Rol. Abr.* 565. a. 2 *Rol. Abr.* 264. (D), and 265. (D), pl. 2. (a).

If every uncertain custom be void, this cannot be for nothing can be more uncertain. The word "near" is not intelligible: but, to make it certain and intelligible should be "nearest" or "adjoining." Supposing many and of different persons lay within a small distance, some yards off, and some twenty &c; which of these lands be said to be *near* within the meaning of this custom? custom, that is laid, is to take and carry away part of coals placed there, and to burn and make into cinder other parts thereof, not saying what part, nor how long to lie there. So in this respect the custom is like quite uncertain.

Secondly; All customs must be reasonable (c), otherwise they are void, as is expressly held in *Davis's Rep.* 32. b. 35. a.; 1 *Leon.* 11; 2 *Rol. Abr.* 266; *Co. Lit.* 59. a. 140. a.; and in 59. a. an instance is put of such unreasonable and void custom.

(a) A custom for poor and indigent householders living in *A.* to cut at away rotten boughs and branches in a chace in *A.* is bad, the description of poor householders being too uncertain. *Silby v. Robinson*, 2 D. & E. 75. a prescription to take three Winchester bushels of barley out of and to ship's cargo of barley brought upon a quay to be exported in any sufficiently certain; for the word "cargo" is a mercantile term, and given when referred to a ship. 2 *Sir.* 1228; 1 *Will.* 91. See the note of the learned editor (post. ed.) of Sir J. Strange's Reports on the above the printed report of that case.

(b) But in *Bennington v. Taylor*, 2 Lutw. 1517, A prescription for money for setting up a stall in a fair, and for ground near the stall, occupied with it, was holden to be sufficiently certain, because it may be obtained by the usage of the fair.

(c) A custom, "that when a tenant took a farm in which there was open field, more or less, for an uncertain term, it was considered as a term three years to three years," was holden to be unreasonable and void, because one rood might determine the tenure of 100 acres inclosed. *Rees v. Lees*, 2 Bl. Rep. 1171.—So a custom in a parish "that every parson may bury his dead relations in the church-yard as near as possible to his ancestors" was ruled to be unreasonable and bad. *Fryer v. Johnson*, 28.—But it is a reasonable and good custom that tenants whether by deed shall have the away-going crop after the expiration of their term, for the benefit and encouragement of agriculture. *Wright v. Douglass*, 201. So also a custom, that the tenant may leave his away-going crop in the barns &c. of the farm for a certain time after the expiration of his lease and his quitting the estate, is good. *Beauvan v. Delaney*, 1 Rep. 5. See the case of *Bell v. Wardell*, sup. 202. and the cases referred to.

And certainly no custom can be more unreasonable than present. It may deprive the tenant of the whole profits of the land; for the lord or his tenants may dig coal-pits on and as often as they please, and may in such case lay their coals &c. on any part of the tenant's land, if near to the coal-pits, at what time of the year they please, and may keep them there as long as they please; for the custom, as it is laid, does not say *at convenient times*, nor *till they can conveniently removed*; nor does it say that they may be laid there for the *necessary* use or enjoyment of the pits. So it may be laid on the tenant's land and continue there for ever, though it may be more convenient for the lord to dig them on his own land, which is absurd and unreason-

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BROAD-
BENT.
against
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The objection that this custom is only beneficial to the lord (a), and greatly prejudicial to the tenants, is, we think, of no weight; for it might have a reasonable commencement notwithstanding, for the lord might take less for the land on account of this disadvantage to his tenant. But the objections to this custom are, that it is uncertain and therefore unreasonable, as it may deprive the tenant of the whole benefit of the land, and it cannot be presumed that a tenant at first would come into such an agreement.

The cases that were cited for the defendant were 1 *Leon.* 8 Co. 126; 2 *Bulstr.* 195; 3 *Lev.* 160. But none of these cases are at all like the present, except the case in *1 Leon.* which comes the nearest to it. But that is different from it in this respect, that the custom there was *certain*; though it was not a very reasonable one, it was not so unreasonable but that it might have had a reasonable commencement.

As to what was said that this defect was aided by the verdict for that the jury, having found for the defendant, have found that there was such a custom, we think that this will not be so; for if the custom be in point of law a void cus-

See Bateson v. Green, 5 D. & E. 411; *Clarkson v. Woodhouse*, M. 23; *B. R. ib.* 412; n. a; and *Folhard v. Hemmets*, Sittings after E. 16; *C. B. ib.* 417. n. a.

1742. tom, the finding of the jury will not help it, as has terminated in several cases.

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We are therefore of opinion that judgment must be entered, and the rule for that purpose made absolute."

The counsel for the plaintiff, having mistaken the their rule, afterwards obtained another rule calling or defendant to shew cause why judgment should not be entered on the authority of *Salk. 173. Jones v. Bodenham 319. Philips v. Bury; Staple v. Heydon, 6 Mod. 1; Abr. 98, 99 Vin. Abr. title "Judgment," and G Hanley (a), C. B.*; which rule was opposed in the term.

"Saturday, Nov. 13th, *Willes Serjt.* and *Bent* shewed cause for the defendant why judgment should be entered for the plaintiff.

They admitted the cases cited by the plaintiff's but endeavoured to distinguish this case from them, they said that in them there was but one count and whereas in the present case there were two counts, defendant had pleaded not guilty to all the trespasss in second count and to the force and arms in the first count that issue was found for him. They insisted therefore as the whole verdict could not be set aside, there could be no judgment for the plaintiff, but that there must be a *facias de novo*; and for this purpose they cited *1 d 801, 802; 2 Rol. Abr. 722. pl. 19, 20., and several* cases.

But the cases cited only prove that where several counts were joined and the jury did not find a verdict upon them, or where they found a special verdict on one count which afterwards proved to be defective, or where in a demurrer to part and an issue joined as to the other part a venire awarded to inquire of damages on the demurrer as well as to try the issue the jury did not inquire of the

the demurrer, in all these cases there must be a venire facie novo; and that in the last case it could not be helped by writ of inquiry, for the jury must pursue their authority and every thing that they are directed to try, otherwise their list is defective and there is no other remedy but a venire as de novo (a). But the present case is very different; here the jury have found a verdict on both issues, and there is no default in them; and therefore there is no difference between this and the cases cited for the plaintiff, only the judgment must be entered in a different manner, that is, judgment for the defendant on the issue that is found for him, and interlocutory judgment for the plaintiff as to the other.

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BENT
against
WILKES.

This gave us an occasion to inquire how the judgments entered in these cases, and how the judgments ought to be entered in the present case; we therefore enlarged the list, that precedents might be laid before us, and that the best might be brought into court before we directed how judgment should be entered.

It was said by the officers that in the case of *Craven v. My* the judgment was entered up without taking any notice of the verdict, as upon the defendant's confessing the issue, which we thought very wrong, and therefore ordered the matter to be inquired into, that if it were so and the judgment not actually entered on record we might rectify it, but otherwise we could not do after the term in which the judgment was pronounced.

Two precedents were cited of the entries of these sorts of judgments; 2 *Rol. Abr.* 99 (b); and *Cartlew* 372. (c), the last of *James v. Bodinner*; the last of which seems to be copied from the other; and in both of them the issue and verdict are entered; and then the record goes on and says because it appears to the Court that the matter pleaded by the defendant by way of justification is not a good defence,

See the cases on this head collected in 1 *D. & E.* 528. n. b., and in 2 *D. & E.* 126, n. a.

1 *Rol. Abr.* 99 D. pl. 1.

Cartlew, 379; *Salk.* 173; 1 *Lord Raym.* 50; and *Com.* 8. S. C. See also *James v. Ris*, 2 *Sr.* 873.

and

forth the replication issue and verdict, and the open Court on the plea, that *notwithstanding such verdict* should be for the plaintiff, because by this mode of difficulties would be avoided which might arise in a case where the verdict was not to be set aside in toto.

And my Brother *Burnett* said there were several *Townsend's Judgments*, title "Prohibition (a)," in which.

In order therefore that we might settle a right in the present case, we enlarged the rule till *Monday 1 November*."

The following note occurs on a subsequent day in term.

"It appeared that no judgment had ever been entered in the case of *Craven v. Henry*, one or both of the parties dead. And in the present case we ordered the verdict and issue to be entered up, and then to enter judgment (b) on the first issue for the plaintiff, notwithstanding the verdict (c) by reason that the defendant had confessed the trespass, and had not insisted on any plea. But we left it to the plaintiff to enter up for the defendant on the second issue either now or on writ of inquiry executed, as he should be advised."

(a) Vid. *Townsf. Judgm.* 170, 174.

(b) The judgment in this case was affirmed in *R. R. on a*

1742.

FISHER *against* KITCHINGMAN.

M. 16 Geo.

2.

Thursday,

Nov. 11th.

RULE nisi (*a*) had been made for a new trial in a special action on the case, which had been tried at the last assizes before my *Brother Burnett*.

objection was that he had allowed a postea to be given for the plaintiff, which he ought not to have done. As, as he stated it, was thus. It was a special action on the case for the fifth part of the expence of a suit, to which defendant had agreed to contribute in that proportion. Plaintiff pleaded the general issue, non assumpsit. The issue was laid and proved, which recited that an action was brought and a declaration delivered; and then the declaration on and says (inter alia) that such proceedings were taken because that it came on to be tried on an issue joined by Mr. *J. Parker* on such a day at the assizes for *Yorkshire* on such a day; and that a juror was withdrawn, the cause referred by rule of court, and an award made. Plaintiff admitted that the only evidence that was produced of the case being brought to a trial on an issue joined, and of a juror being withdrawn, and a rule of reference entered into, was the record of nisi prius and the postea indorsed upon it.

The nisi prius record and the postea indorsed are evidence to prove that the cause was tried, but not to prove that a verdict was given. *Barnes* 449. 7 Mod. 451. oct. ed. S. C.

The single question is whether the record of nisi prius and postea indorsed was proper evidence of these facts. If the record of nisi prius and postea were produced by the assizes of that circuit, who swore that they had been in his court ever since the trial.

Several cases were cited on both sides to shew that postea were not evidence. But

They were of opinion that no general rule could be laid in relation to this point; but that they were or were not evidence according to the nature of the thing which they were produced to prove. If they were produced only to

a) On the application of *Agar* Serjt. and *Draper* Serjt.

prove

1742.

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against
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TING-
MAN.

prove that a cause was brought on to a trial, as in the present case, or that such a cause was actually tried, we were of opinion that the record of nisi prius and postea were good and proper evidence (a). But if it were necessary that a verdict should be given in evidence, we were of opinion that they were not sufficient evidence; but that the postea ought to be returned and the verdict entered on record and judgment entered upon it (b): and then a copy of the record would be proper evidence. For otherwise it would not appear but that the verdict might be set aside, or judgment arrested. The only doubt that stuck with me was whether the assessor was the proper person to produce the postea in evidence; but by several rules of court it ought to be returned into court to the proper officer within the four first days of next term. But the prothonotaries informing us that scarcely one postea in an hundred is so returned, and hardly ever when a juror is withdrawn, I thought that this objection was not of sufficient weight to set aside the verdict. And therefore

My Brother *Parker* and I were both of opinion that Brother *Burnett* did right in admitting this evidence, and discharged the rule for setting aside the verdict (c)."

(a) The same point had been before ruled by Lord Chief Justice *Praeger* at *Surry* assizes, 5 Geo. 1. in *Pitten v. Walter*; 1 Str. 161; and by Lord Chief Justice *Raymond* at the *London* Sitt. M. 14 Geo. 2. R. v. *Lee*, Bull. N. 243; and afterwards in *R. v. Minns*, Sittings at *Westminster* after Tr. 20 Geo. 2. *ib*

(b) But this rule does not hold in the case of a verdict on an issue directed out of Chancery, because it is not usual to enter up judgment in such a case: the decree of the Court of Chancery is proof that the verdict is in fact. *Montgomery v. Clarke*; at the Delegates, 1745, Bull. N. P. 234.

(c) Afterwards a motion was made to arrest the judgment in this case; but according to *Barnes* 284 judgment was arrested in *Esq.* 16 Geo. 2.

1742.

ODRIGHT on the demise of JOHN GOOD-
RIDGE against ELIZABETH GOODRIDGE.

M. 16 G. 2.
Wednesday,
Nov. 17th.

THE opinion of the Court was delivered, as follows, by

Villes, Lord Chief Justice. "This comes on before the
Court on a case (a) that was made before my Brother *Abney*
Justice at the assizes held for the county of *Devon* 20th of
Nov. 1741.

The devi-
sor, having
devise'd his
lands to his
wife for life,
added these
words in his
will, "if
my son R.
(the eldest)
happen to
die without
heirs, then
my son J.
shall enjoy
my lands:"
held that
R. took on-
ly an estate-
tail, and
that on his
death with-
out issue,
and without
having levied
a fine or
suffered a
recovery, J.
was entitled
to recover
from the de-
visee of R.
7 Mod. 453.
oct. ed. S.

The case is in short this. *John Goodridge* being seised in
of the premises in question, and having two sons *Richard*
John, made his will 9th of *August* 1733; and having
in all his lands to his wife *Joan* for her life, except one
which he devised to her in fee, and after having given se-
veral pecuniary legacies to his children, used these words on
which the question depends; "and my will is that if my son
Richard do happen to die without heirs, then my son *John*
shall enjoy my lands." The devisor is dead. *Joan* is also
dead. After her death *Richard* enjoyed the lands, and died
without issue on the 14th of *February* 1740, and without
having levied any fine or suffered any recovery, devised the
premises by his will to his wife the defendant *Elizabeth* and
heirs. *John* the second son is the lessor of the plaintiff.
In other things and other parts of the will were stated in
the case: but they are altogether immaterial to the point in
question, which is simply this,

Whether *Richard* the eldest son, considering the words of
his father's will, were tenant in tail or tenant in fee: if he
were only tenant in tail, his brother, the lessor of the plain-
tiff, is undoubtedly entitled to recover; if he were seised in
fee, the right is as plainly in the defendant, his devisee.

This question will depend upon these two points,
1st, What construction is to be put upon the word
"heirs" in the will;

(a) Which was argued on *Tuesday* November the 9th 1742 by *Stinner* King's
Counsel for the plaintiff and *Brinsford* Serjeant for the defendant.

ter an absolute fee either by way of remainder
executory devise.

But the words "heirs of *Richard*" in the
must be taken to mean *heirs of his body*; for *R*
not die without heirs, if his brother *John* were
this rule of construction, which is founded on
has been settled in a multitude of cases (*a*), an
to be much controverted by the counsel for the
the present case. There is no case that I know
it was ever doubted, except the case of *Hearn*
Car. 57, and there were two very great Judges,
Croke, against the other three. But ever since
cases have been all uniform and agreeable to the
thing. It is so expressly determined in the case
Hearing, Cro. Jac. 415; in the case of *Chad*
Cro. Jac. 695; in the case of *Parker v. Thatke*
in the case of *Blaxton v. Stone*, 3 *Mod.* 123; and
of *Nottingham v. Jennings* (*b*), *Tr.* 12 *W.* 3. In
all the former cases were considered and agree
It would have been otherwise indeed if the fee
had been to a stranger, because then the testator
not been apparent, but he might intend to limit
fee, which cannot be by the rules of law. An
tion is settled in the case of *Crumble v. Jones* (*c*),
B. R., according to the case in *Dyer* 33, and so
in the Year Books.

Let it be taken for granted that the word "heirs" means heirs of the body of *Richard*, and then the clause will be thus; "if my son *Richard* do happen to die without issue of his body, my son *John* shall enjoy my lands"; which is the same thing as if he had said "I give my lands to my son *John* if my son *Richard* die without heirs of his body", in which case there could have been no doubt but that *Richard* had been only tenant in tail.

1742.

GOOD-
RIGHT
dem. GOOD-
BY DOZ
against
GOOD-
BY DOZ.

But a distinction was endeavoured to be made by the counsel for the defendant, where there is an express devise to the testator and his heirs in the former part of the will, and where there is no such devise, for in that case it was said that the eldest son took a fee-simple by descent which could not be altered or restrained by implication, and that as he took nothing by the will he ought not to be affected by the will.

But this distinction has no foundation either in reason or in law. In reason it has none; for as every tenant in fee-simple has power to dispose of his estate as he pleases, and the testator has no right but what is controllable by his ancestor, the only question is what the testator intended; and it is not to say that it is more plain that he intended that his son should have a fee-simple when he has given him no estate by his will than when he has expressly devised it to him and his heirs. Besides it is admitted that when a man leaves his estate to his heir in fee such devise is void, and he takes by descent and not under the will, as has been determined in a multitude of cases. And it is strange to say that a devise in a will which is absolutely void shall make any difference in the construction.

Nor has the distinction any foundation in law; nor do the cases, that were cited to support it, prove any such thing. *Law's case*, which was cited out of 8 Co. 148., has no room to it; only it happens to be said in general in that case that *fortior est dispositio legis quam hominis*, a maxim which is true in many instances, but it is in no wise applicable to the present case.

In *Clashe's case* reported in *Dyer* 330. b. it is only determined that an heir at law shall not be disinherited by a possi-

vous of an heir than ever any person did before
case, as I shall shew presently, is so far from be-
rity for the defendant that it is an express au-
him.

The case of *Hamfworth v. Pretty*, *Moor* 64,
ry intelligible case, and it is no authority in fav-
fendant, or in favour of this distinction; for
express devise to the eldest son and his heirs, al-
holden that a devise to the three younger children
devise, if the heir did not perform a condition;
holden that the heir took by descent, and that
did not affect his estate; so that I do not under-
Court in that case founded their opinion upon
imagine that the case is not rightly reported (b)

The case of *Soule v. Gerrard* or *Garret*, rep
El. 525, and *Moor* 422, depends merely on the
of the word "or", and is in nowise applicable
case. Besides in that case there was an express
eldest son and his heirs.

The case of *Scrape v. Rhodes* (c) in this con-
no resemblance to this or any other case.

(a) *Moore* d. *Fagge v. Heafeman*, *sup.* 140, 141.

(b) According to the report of this case in *Cro. Elm.* 91
the eldest son and his heirs is void by way of devise: but it is

th there are no cases in favour of this distinction several which shew that it has never been re- which I shall only mention two or three, which be sufficient in so plain a case as the present. ir's estate may be turned into an estate-tail by im- ough there is no express devise before to the heir, ily from *Cosen's* case in *Owen* 29, which though ally stated is clear enough as to this point. In ere was no devise to the eldest son *Richard*, but se words "If it please God to take to his mercy ard before he hath issue, so that my lands shall my son *George* before he shall be of the age of then my overseers shall have my land until *George* at age:" held by all the Justices that *Richard* estate-tail; which is a much stronger case than for in that case there is only an implication that econd son should have the estate in case *Richard* ed without issue of his body: but here it is said s words.

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RIGHT
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RIDGE
against
GOOD-
RIDGE.

of *Gardner v. Sheldon* in *Vaughan* is likewise as se a case in point; for there was no express de- ge the eldest son and heir, but the question depend- words "If it happen that my son *George* and Katherine my daughters die without issue of their ily begotten, then all my free lands which I am f shall come remain and be to my nephew *Wil-* d his heirs." There was a great doubt what ef- ook by these words, and whether or no the daugh- y estate at all; but there was no doubt but that if y and *Katherine* all died without issue of their bo- r *Rose* would be entitled to the estate either as a emainder or by way of an executory devise.

n 13 *Hen. 7. (a)* which has been agreed to be law und has been the foundation of many subsequent ns, it is said that if a man devise his estate to his ister the death of his wife, the wife has an estate plication; which shews that the estate which the icent may be abridged and lessened by implica-

(a) Fo. 17. pl. 22.

1742.

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RIGHT
dem.
GOOD-
RIDGE
against
GOOD-
RIGHT.

I do not at all rely on *Beresford's* case 7 Co. 40, that was the case of a feoffment to uses; and depends very great a nicety that it is no authority in the present and can hardly be cited as an authority in any case unless a deed of uses should happen to be penned in the same words.

Having got rid of this distinction, I shall say now that the rule for the construction of these sort of wills which is laid down and agreed to by all the Judges in *of Spirt v. Bence*, Cro. Car. 368., "that the words which disinherit an heir ought to have a clear and intent, and not to be ambiguous or in any way doubtful and surely no words can be more plain and clear than the words of the present are. Nay if this will were to be construed even as to *Vaughan's* rule, which I mentioned before, and think is carried too far (a), that there must be a necessity to disinherit an heir at law, I think that the of the present will do necessarily imply that it was the testator's intent that his second son should have the estate his eldest died without heirs of his body.

If indeed the second son had died before the eldest the question had been between the devisee of the eldest and a son of the second son, there might have been some doubt but at present we think there is none, and that the testator's lessor of the plaintiff must have the benefit of the estate and the possession must be delivered to him."

a) *Vide Moore & Fagge v. Hensman*, sup. 140, 141.

TWELLS *against* COLVILLE.

1742.

Saturday,
Nov. 20th.

RULE nisi had been made on the motion of *Bootle* Serjt. for an attachment against a sheriff and his deputy for taking a replevin bond upon his granting the replevin, want to the directions of the statute 11 Geo. 2. c. 19 (a). The Court refused to grant an attachment against a sheriff for not taking a replevin bond, on his granting the replevin

The 23d section of which (in order to prevent vexatious replevins of goods taken for rent) enacts that all sheriffs and other officers having authority to grant replevins may and shall in every replevin of a distress for rent take known names from the plaintiff and two responsible persons as sureties in double the value of the goods distrained, conditioned for prosecuting suit with effect and without delay and for duly returning the goods distrained in case a return shall be awarded before any deliverance be made of the suit; and then it authorises the sheriff &c. to assign such bond to the avow-ment making cognizance &c.

An Action will lie against the sheriff not only for not taking a bond, but for taking insufficient pledges. *Russ v. Paterson*, 13 Geo. 2. B. R. writ of error from C. B.; 16 Vin. Abr. 399. pl. 4; under the name of *W. v. Pattison*; Bull. N. P. 60. In such an action some evidence must be shewn by the plaintiff of the insufficiency of the pledges or sureties; but very evidence is sufficient to throw the proof upon the sheriff. *Saunders v. Wexminster* fittings, Trinity 10 Geo. 3. C. B. Bull. N. P. 60.

Though there have been contradictory determinations respecting the extent of a sheriff's liability in such an action, the point seems now to be settled. In *W. v. Pattison*, the party recovered damages to the amount of the rent in arrear to the costs of the replevin: but the whole together did not exceed the value of the distress. 4 D. & E. 434. So in the case of *Gibson v. H.*, 30 Geo. 3. Gould J., who tried the cause, was of opinion that the sheriff was entitled to recover the costs in the replevin as well as the rent in arrear. But in *Yea v. Lethbridge*, M. 32 Geo. 3, the Court of King's Bench, on a question reserved at the trial for their opinion, held that the plaintiff could not recover beyond the value of the distress taken, which was not so the rent in arrear. 4 D. & E. 433. And though this decision was afterwards questioned in the Court of Common Pleas (1), in *Concanen v. Leith*, 1 B. 32 Geo. 3. 2 H. Bl. Rep. 36, where it was ruled after great consideration that the plaintiff might recover damages to the extent of the injury he had sustained, though they exceeded double the value of the goods distrained; the authority of the case of *Yea v. Lethbridge* was again established in a subsequent case, *Evans v. Brander*, Tr. 35 Geo. 3., where the Court in two pleas (2) (three of the Judges then changed) decided that the sheriff was not liable for more than double the value of the goods distrained. Bl. Rep. 542. The foundation of the last decision and of that of *Yea v. Lethbridge*

That Court consisting of Lord Loughborough Lord Chief Justice, Gould J. and W. J. J.

Then consisting of Eyre Lord Chief Justice, Buller J. Heath J. Roofs J.

1742. and only desired that it might be made absolute against *Abbot*, one of the sheriff's deputies who granted the replevin.

TWELLS
against
COLVILLE.

Agar Serjt. offered many things in excuse for *Abbot*, and desired to read several affidavits. But he insisted, among other things, that the Court had no authority to proceed in this summary way against the sheriff or his deputy as for contempt, but that the party injured might bring his action against *Abbot* upon the act.

We thought it proper to have this matter thoroughly considered in the first place, before we read any affidavits, because reading the affidavits as to the fact would be in some measure admitting that we thought we had an authority to proceed in this summary way. The cause on the replevin had proceeded so far that there was judgment for the defendant, a retorno habendo awarded, and elongata returned.

I thought that this method of giving a bond having been practised many years instead of giving pledges, and being now substituted in the room of that common law method of the authority of the act of parliament, the proceeding ought to be in the same manner against the sheriff as it was before by scire facias or action on the case. And I put the cause for the defendant to shew that an attachment was ever granted against the sheriff for not taking pledges. This is no contempt of the Court, but only a disobedience to the act. And I could not see how the court could proceed in this method, unless the party had been guilty of a contempt.

My Brother *Parker* seemed to think otherwise, and said this was a similar case to the case of a sheriff refusing to pay a year's rent to the landlord according to the directions of the stat. 8 An. c. 14. when the goods of a tenant are taken in execution. For there though an action on the case will undoubtedly

Lethbridge is this; that the sheriff is liable no farther than the sureties would have been if he had done his duty by taking a bond under the stat. 11 Geo. II. c. 19. and the sureties had been sufficient; and that the extent of their responsibility is limited by the statute to double the value of the goods distrained.

ist the sheriff, the Court upon the motion of the land- 1742.
ally proceeds (in order to save expence) by way of
) against the sheriff, and if he disobeys it will grant TWELLS
hment. against
COLVILLE.

I thought that case very different from the present;
there if the sheriff takes the goods in execution and
s them before he pays the landlord his year's rent, the
on (which is the process of this Court) is irregularly
d, being executed contrary to law, and therefore the
will interpose. But there is no process of this Court
directs a bond to be taken, nor would the Court stay
ceedings in replevin for want of the taking of such
but it is taken in pursuance of the directions of the
not of this Court; and therefore though no bond be
there is no contempt of this Court.

Brother *Burnett* seemed to think my distinction right.

never we gave no opinion, but ordered this point to be
ghly considered and spoken to."

the last day of the term the rule was discharged.)

ad now (*b*) *Boote* Serjt., to whom we had recommend-
see if he could find any precedent before the act of an
rent having been granted against a sheriff for not tak-
per pledges, very fairly admitting that there was no
ecedent, and that he thought the point was against
eured that his own rule might be discharged (*c*)."

id *Henchett v. Kimpson*, 2 Willf. 140; *Darling v. Hill*. Rep. temp.
255; *West v. Hedges*, Barnes 211; and *Andr.* 219.
the last day of the term.

R. v. Lewis, Tr 28 Geo. 3. The Court of King's Bench also refus-
it an attachment against the sheriff for not taking a replevin bond, 2
617. But in the case of *Richards v. Aston*, 2 Bl. Rep. 1220, the
Common Pleas, on a summary application, made a rule on the she-
er-sheriff, and the replevin clerk, who had refused to discover the
the pledges taken on granting the replevin, to pay to the defendant
inj the damages and costs recovered by him. See, however, Lord
observation on that case in *Yea v. Lethbridge*, 4 D. & E. 435.

1742.
M. 16 G. 2.
Monday,
Nov. 29th.

HENRY GRILLS *against* MARY MANNELI, T
MAS ELFORD and SAMUEL BUNT.

In replevin the defendant avowed &c., and stated in his avowry that by lease and release he in consideration of an annuity therein mentioned conveyed certain premises containing the place where &c. to the plaintiff in fee, subject to a rent-charge payable to the defendant during her life, with power of distress for non-payment of the annuity; and that by virtue of the lease and release and by force of the statute &c. the plaintiff became seised in fee &c.; and then she justified &c. as a distress for non-payment of the annuity.

THE following opinion of the Court was given by

Willes, Lord Chief Justice. "Replevin; in which plaintiff declares for taking one red ox, one brown ox, two brown steers on the 28th of *March* 13 *Geo.* 2. at a place called *Trewoodla* at *Southill* in *Cornwall*, and detaining &c. Damage 13*l*.

The defendant *Mary* avows in her own right, and defendant *Thomas* and *Samuel* as her bailiffs acknowledge, taking &c.; because they say that long before the time &c. viz. on the 25th of *March* 4 *Geo.* 2. by a certain indenture made between the said *Mary* and the plaintiff the *Mary* for the consideration of a sum of money did bargain and sell to the plaintiff all that moiety or halfendial of those messuages &c. in *Trewoodla* in the parish of *Sant* whereof the said close wherein &c. then and long before and is parcel, together with a certain parcel of common, all other appurtenances &c. to the said messuage &c. being then in the occupation of the plaintiff, to hold from day next before the date of the said indenture for one year by virtue of which bargain and sale the plaintiff was possessed &c. the reversion thereof belonging to the said *Mary* and heirs, and being so possessed and the reversion thereof belonging to the said *Mary* and her heirs as aforesaid she the said *Mary* afterwards and before the time when &c. by another indenture made 26th of *March* 4 *Geo.* 2. between the said *Mary* and the plaintiff for and in consideration of the annuity therein mentioned to be paid to her from and out of the premises during her natural life and of 1*s.* to her in hand paid by the plaintiff did release to the said plaintiff and his heirs forever the said reversion with the appurtenances, to hold and to hold the same to the plaintiff and his heirs, to

On demurrer both pleas were holden bad; the first because it denied what was before admitted, and because it traversed only a consequence of law; the second, because it admitted that the defendant had an estate sufficient to justify the distress.

f him and his heirs for ever, subject to the payment of rent-charge or annuity thereafter mentioned, that is to wit that it should and might be lawful for the said *Mary* her assigns during the term of her natural life to have receive one annuity or yearly rent-charge of 7*l.* 10*s.* of 1 money of *Great Britain* free from all taxes &c, and to be paid at the four most usual feasts, viz. the feast of *John the Baptist* &c, by four even and equal portions; by the said indenture it was agreed that if the said annuity of 7*l.* 10*s.* should be behind and unpaid twenty-one days after any or either of the said feast days &c. it should might be lawful for the said *Mary* and her assigns to enter upon the premises and to distrain &c; by virtue of the said lease and release and by force of the statute &c. the plaintiff entered into and became seised of the premises in his demesne as of fee, subject &c; and the defendants by taking the cattle by way of distress for 9*l.* 7*s.* 6*d.* of rent due for a year and a quarter ending at *Christ-* 1739 and not paid within twenty-one days afterwards, before they pray judgment &c.

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the plaintiff to the avowry, protesting that he never entered into the said premises by virtue of the lease and release, he saith that he never was seised of the said premises as mentioned in the said indenture of release in his demesne as of fee; and this he prays may be inquired of by the jury.

And for further plea by leave of the Court saith that true and lawful that the said *Mary* on the 25th of *March* 4 *Geo.* 2. did by the said indenture bargain and sell to the plaintiff a messuage or halfendal of all those messuages &c. to hold from the said plaintiff before the date thereof for one year, by virtue of the said bargain and sale and the statute &c. the said plaintiff is now possessed of the premises &c; and further saith that at the time of making the said bargain and sale the said *Mary* was lawfully seised of the said premises as of her freehold for the term of her life, the reversion thereof belonging to — *Mannell* and his heirs, who is seised thereof to him and his heirs; and traverses that *Mary* was seised of the premises by the said indenture and the reversion thereof belonging to the said *Mannell* and his heirs in manner as the defendants in their avowry have acknowledged;

1742. ledged; and this the plaintiff is ready to verify &c; and prays judgment &c.

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To both these pleas of the plaintiff the defendants demur generally, and the plaintiff joins in demurrer. And upon these two demurrers the cause comes now before the Court.

To the first plea there are two objections (a);
1st, That it denies what is before admitted;
2dly, That the traverse is only of a consequence of law.

And we are of opinion that the first plea is bad in both these respects.

First, Because the plaintiff has denied that he was seised in fee by virtue of the lease and release, though he has in effect admitted it before. For in this plea he has not denied, not even by way of protestando, that *M. Mannell* was seised in fee at the time of making the lease and release; and though he has denied it in his second plea, that will make no alteration, it being a known rule and never controverted that one plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself. And as he has admitted in this plea that *Mary* was seised in fee, and that being so seised she made a lease and release to the plaintiff and his heirs, the necessary consequence of that is that he must be seised in fee by virtue of such lease and release; for I defy any one to put a case where a person seised in fee makes a lease and release to another and his heirs, and yet the grantee shall not be seised in fee; and yet this is the very thing denied by this plea.

Secondly, If there could be any doubt of this, (but there certainly is none,) the only doubt would be, whether this be the necessary consequence in law, that is, whether these deeds of lease and release have this operation in law or not. And it is a certain known rule, never that I know of once controverted, that a man cannot traverse a consequence of law, and for this plain reason because it is a matter of law and not of fact, and therefore not proper to be tried by a jury.

(a) The case was argued on the 22d of May preceeding by *Droper* Serjt. in support of the demurrer and by *Gaffer* Serjt. contra.

We

We are therefore clearly of opinion with the defendants that the first plea in bar of the avowry is not good.

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As to the second plea: it is a matter of much more difficulty; and upon the strength of the cases in *Dyer* and *Holt* which were cited for the plaintiff, and which I shall take notice of by and by, I own I was at first of opinion that the second plea was a good bar to the defendant's avowry.

But upon further consideration, and conferring with my Brothers, I have altered my sentiments. And we are now of opinion that the second plea is not good, and that the case is plainly distinguishable from all the cases which were cited to support this plea. That a matter which is not material, if alleged by a plaintiff in a declaration or by a defendant in a plea or avowry, may be in many cases traversed by the other party, and that the estate in fee of the defendant *Mary* being alleged by her avowry (though she did not have said that she was seised in fee) may be traversed in the present case, we do not deny; and the cases which were cited go no farther.

In *Dyer* 280. pl. 15. nothing more was determined (and not in the principal case but in a case that was there decided) than that a man may traverse a seisin in fee, when it is particularly alleged in an avowry. But in that case by way of inducement the plaintiff shewed that if the person were not seised in fee the defendant had no right to the thing avowed for; and it is the same case, or exactly to the same effect, which is afterwards reported in *Dyer* 312. 90.

The case in *Dyer* 365. pl. 32., which was the case that is most relied upon, was thus. In replevin the defendants justified taking the cattle as bailiffs of Sir *Francis Leke* as a damage feasant in a close which was his freehold: the plaintiff pleads in bar that he was seised in fee of a close called *Butclose* adjoining to the said close of Sir *Francis Leke*, & Sir *F. Leke* &c. of right ought to keep up the fences between these two closes, and that the cattle escaped into Sir *F. Leke*'s close by reason that those fences were out of repair. The defendants in their replication, protesting that there was no such right of inclosure, for plea say that the said close called *Butclose* was the soil and freehold of the Earl

1742. Earl of *Shrewsbury*, and traverse the plaintiff's being seisin in fee; and it was holden to be a good traverse, because though the plaintiff need not have set forth that he was seisin in fee, (for if he had said that he had only an estate for life, for years, or at will, it had been sufficient to have supported his plea) yet if he will give his adversary this advantage by alleging that he had an estate in fee which need not have done, the Court were of opinion that the traverse was good. But it is observable in that case that defendants were so far from admitting in their plea that plaintiff had an estate for life, for years, or at will, they expressly said that the soil and freehold was in another which I shall shew presently distinguishes it from the present case.

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What is said in the case of *Digby v. Fitzberbert*, 103. is merely founded on these cases in *Dyer*, and does not carry it a jot farther; nor do I know that it has been relied farther in any case whatever.

But in the present case the plaintiff is so far from denying that the defendant *Mary* had an estate sufficient to justify the distress, that in his plea by way of inducement to traverse he expressly admits that she had an estate for life at the time of her making the lease and release, and that she is still living. It appears on the whole record, by the plaintiff's own admission, that the distress was well taken; though the plaintiff's traverse were true, that she had an estate for life and not an estate in fee, if she had an estate for life the rent was due and payable to her during the continuance of that estate. If indeed by way of inducement he had said that the estate was in another, or that *Mary* was possessed only of a term for years which was expired, this would have altered the case. But as he has admitted that she had an estate for life, this plainly distinguishes it from all the cases that were cited on this head.

To this I think there can be but three objections: one of which was made at the bar;

First; That the lease and release made by *Mary*, to the plaintiff and his heirs was a feiture of her estate for life; and that the plaintiff took nothing by the grant, and therefore was not obliged to pay the rent.

: other two objections not made at the bar are, andly, That this was a cheat on the plaintiff, who not probably have agreed to pay so much rent during the life of *Mary* but in consideration that he was to have the estate to him and his heirs after her death, and that this release was laid in the avowry to be the consideration of the release;

andly; That it is only said by way of inducement that was tenant for life, and that what is said only by way of inducement is not material.

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the first objection there are two answers;

That if the lease and release did create a forfeiture, there would be no objection in the mouth of the plaintiff until he is actually evicted. For so long as he continues in possession, he ought to pay the rent; and he has not shewn any eviction.

The second answer is that a lease and release by a tenant for life do not create a forfeiture; and the cases were cited prove no such thing. For in 1 *Co.* 140; *liz.* 131; 1 *Leon.* 125; and 1 *Rol. Abr.* 854; it is said that a *feoffment* in fee by tenant for life is a forfeiture of his estate, which is certainly true, of a *feoffment*: but a lease and release (*a*), by which a man only conveys an estate which he has a right to convey, there is no forfeiture. And so it is expressly said in *Co. Lit.* 328. *a.*; and so is established a rule in all the books that I need not say any other case to support it.

As to the second objection: it does not appear on the facts whether the rent reserved be more than the yearly value of the estate. If not, there is nothing in the objection; but if it be, it is no objection at law; but the deed is equally good and the rent payable during the course of the estate for life, though it may perhaps be a ground for relief in equity.

As to the third objection: it depends entirely upon this, whether what is said in the inducement to the traverse be true or not. And we are all clearly of opinion that it

See *Seymour's case*, 10 *Co.* 95; *Machell v. Clarke*, 2 *Ld. Raym.* 779; *perd v. Stiffson*, 3 *Burr.* 1703; and *Doe d. Neville v. Rivers*, 7 *D.* 6. as to the effect of a lease and release by a tenant in tail.

1742. is so. And so it plainly appears to be by the case of Sir
Walter Sands v. Lane, Cro. Eliz. 667, and several other
 cases.

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Judgment therefore must be for the defendants."

—"N. We did not consult my Brother *Fortescue* &
 he not being in Court at the arguing of the case; but Mr
 J. *Parker*, who this day kissed the King's hand for the of-
 fice of Lord Chief Baron, agreed with my Brother *Burns*
 and me."

M. 16 G. 2. The Master, Wardens, and Society of the Mylles
 Monday, of GUNMAKERS of the City of LONDON against
 Nov. 29th. STEPHEN FELL.

THE opinion of the Court was delivered as follows by

A bye-law
 made by the
 Gunmakers'
 Company
 "that no
 member
 should sell
 the barrel of
 any hand-
 gun &c.
 ready prov-
 ed to any
 person of the
 trade, not a
 member, in
 London or
 within four
 miles; and
 that no
 member

Willes, Lord Chief Justice. "Debt; in which the
 plaintiffs set forth the charter 14th of *March 13 Car. 1.*
 which the Company was incorporated, which recites
 great inconvenience that happens to the public by un-
 lawful persons making trying and proving guns, and for
 formation of such abuses and in order that the trade
 be carried on in a proper and skilful manner the King
 constitutes and appoints several persons therein named
 all others then using or who should thereafter use the
 gunmaking within the city of *London* or within four
 compass thereof, and all such others as should be accepted
 admitted in such manner as in the said letters patent is
 pressed, to be a body corporate by the name of the master

should strike his stamp or mark on the barrel of any person not a member of the
 company &c. under a penalty of 10s. for each offence," was holden not good, as
 restraint of trade; it not appearing from any thing set forth in the declaration that
 was any adequate reason for these restraints or any consideration to the persons restrained.

—General restraints of trade are bad: particular restraints, either as to time or place,
 are good, if for a sufficient consideration.

—A bye-law, made by the Gunmakers' company, inflicted a penalty, half to the
 of the poor of the Company, and half to the use of the discoverer, without saying
 was to sue for it; whether the Company may not sue for the penalty? Qu.

—In an action for a penalty for breach of a bye-law, whether it should not be put
 stated that the defendant was subject to the bye-law when he did the act complained
 Qu.

—And whether it be sufficient if it be stated to have been done on a day (after a viz.)
 he was subject to the bye-law, as it appears on other parts of the declaration? Qu.

the and society of the mystery of gunmakers of the city of London; and gives them several powers, and (amongst the rest) a power for the said master wardens and assistants of the society of gunmakers for the time being or the greater part of them, whereof the master and one of the wardens to be two, make ordain and constitute such reasonable acts orders decrees and ordinances in writing as to them should seem meet for and concerning the art trade and mystery of gunning and the well ordering and government thereof within the said city of London or the liberties thereof and within four miles of the same, and also for the reformation of such abuses and deceits from time to time in uttering inartificial merchantable bad and deceitful guns, or parts of guns &c. whereby his Majesty's subjects might be damnified or endangered &c. and to inflict pains and penalties by fines &c. for the breach of such bye-laws &c. The plaintiffs further sheweth that the said charter was accepted and hath been ever since acted under. And that at a court of the master wardens and society aforesaid commonly called a Court of Assistants held 10th of October 1672 by and before Robert Warden then and there being the master and Joseph Stace & Robert Tough then and there being the wardens of the said society, and fourteen others, (named in the declaration) being a greater part of the assistants of the said society, the said master wardens &c. did make ordain and publish a certain ordinance or bye-law in writing for the good rule and government of the said Company, and did thereby declare "that from thenceforth no sworn member of the said Company should sell or deliver by way of sale the barrel of any manner of hand-gun dagg or pistol ready proved or to the use of any person whatsoever of the said art within the said city or liberties or four miles compass there- who is not admitted and sworn a member or free brother of the said Company, nor should strike or suffer to be struck a proper stamp or mark upon the barrel or barrels of any such person not admitted and sworn; upon pain of forfeiture of 10s. for every such barrel; a moiety thereof to be used of the poor of the said Company, and a moiety to the use of the discoverer, and a stop made of his proof till conformity or payment."

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The plaintiffs aver that such ordinance was and is good and reasonable, and not repugnant to the laws or statutes of the

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kingdom,

said bye-law; and that the said defendant for making of the said bye-law, to wit, on the 1st in the year 1739 at *London* aforesaid sold a great number of barrels of hand-guns, to wit, sixty barrels of hand-guns, ready proved to one *John Halfhide*, which said *Halfhide* at the time of the sale thereof did use and exercise the said art of a gunmaker within the said city of *London* who at the time of the sale of the said gun barrels admitted and sworn a member or free brother of the said society, contrary to the form of the said ordinance by the said defendant hath forfeited and ought to pay to the plaintiffs 30*l.* to wit 10*s.* for each of the said hand-guns so sold by him to the said *Halfhide* and whereby an action hath accrued to the said plaintiffs and have of the said defendant the said 30*l.* and the said 60*l.*

Secondly, They assign for breach that the said defendant after the making of the said ordinance, to wit, on the 1st day of *June* in the year 1739 at *London* aforesaid the said defendant then and there being admitted a member of the said Company did suffer to be stamped or marked upon a great number of hand-guns, to wit, upon sixty barrels of hand-guns, ready proved to one *John Halfhide*, which said *John Halfhide* at the time of the striking of such stamp or mark upon the said hand-guns did use and exercise the said art of a gunmaker within the city of *London* and who at the time of

and society to demand and have of the said debt the said 30^l residue of the said 60^l ; nevertheless the defendant, although he hath been often requested, rendered to the said master wardens and society 50^l. or any part thereof, but hath wholly refused doth refuse to render the same ; and the said wardens and society say that they are damnified to of 70^l. ; and therefore they bring suit &c.

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defendant says that the declaration of the said master &c. and the matters therein contained are not sufficient in law for the said master &c. to have main their said action against him ; to which declaration and the matters therein contained he the said defendant is not under any necessity nor bound by the laws to make answer, and this he is ready to verify ; and for want of a sufficient declaration in this behalf judgment, and that the said master wardens and the mystery of gunmakers of the city of London are barred from having or maintaining their action against him the said defendant.

plaintiffs join in demurrer, and pray judgment, and debt, together with the damages by reason of the said debt, to be adjudged to them.

upon this demurrer to the plaintiffs' declaration the court is now in judgment before the Court.

there have been three objections (a) taken to the declaration ;

that the bye-law, on which the action is founded, is void ;

That, if it be, the breaches are not well assigned.

That, if the bye-law be good and the breaches proved, the action cannot be brought in the name of the corporation.

C c 2

As

the case was argued on three several days, 19th of June 1740, 10th 11, and 23d of June 1742, by *Prime* King's Serjt. and *Urrill* in support of the demurrer, and by *Birch* King's Serjt. and *Droper* for the plaintiffs.

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 I &c. &c.

As to the first objection, we are of opinion, and so are my Brother *Fortescue* and my late Brother *Parker*, (now Lord Chief Baron) that the bye-law is not good as set forth in this declaration. It is very probable that if other parts of the charter and other bye-laws of the corporation were set forth, it might appear to be a good bye-law: but we can take notice of nothing but what is set forth in the pleadings.

The general rule is that all restraints of trade, (which the law so much favours,) if nothing more appear, are bad. This is the rule which is laid down in that famous case of *Mitchel v. Reynolds*, which is very well reported in 1 P. Wms. 181; in which Lord *Macclesfield* took such great pains, and in which all the cases and arguments in relation to this matter are thoroughly weighed and considered; and therefore I will not repeat them to you again in worse words, but refer you to that report, where you may see all the cases cited which relate to this point, and where it is considered in every light in which I think it is possible to consider it.

But to this general rule there are some exceptions; as first that if the restraint be only particular in respect to the time or place (a), and there be a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person may be good and valid in law, notwithstanding the general rule; and this was the very case of *Mitchell v. Reynolds*, where such a bond was holden to be good. So likewise if the restraint appear to be of a manifest benefit to the public, such a restraint by a bye-law or otherwise may be good. For it is to be considered rather as a regulation (b) than a restraint;

(a) See the cases of *Clerke v. Comer*, *Caf. temp. Hardw.* 53; *Chf-man v. Nainby*, 2 *Str.* 739, *Fortesc.* 297; 2 *Ld. Raym.* 1456, and 3 *Bro. Parl. Caf.* 349; and *Davis v. Mason*, 5 *D. & E.* 118.; in the two former of which an agreement by an apprentice, in consideration of being taught his trade, not to carry on the same trade, in one instance within half a mile of the master, and in the other within the bills of mortality, under a penalty, was holden to be a valid agreement. The last case was that of an *assisant* to a surgeon.

(b) See the following cases respecting bye-laws made by public companies, and what bye-law is considered only as a regulation, and what as a restraint, of trade; *Freemantle v. The Company of Silkbrowsters*, 1 *Lev.*

a restraint; and it is for the advantage and not the detriment of trade that proper regulations should be made in it. And it is plain by the recitals of this charter granted to the Gunmakers' Company that this was the very purpose for which this corporation was created.

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It is therefore by this rule and this exception that we must try the present case. And first it is certain that both these bye-laws (a) are restraints upon trade, and therefore bad unless they fall under the exception. To oblige a man after he has finished his barrels not to sell them to any one (b) but one who is admitted of the Company is a great restraint upon trade. So likewise not to put his mark or to suffer his mark to be put upon the barrel of any person not admitted of the Company is a very great hardship and restraint, unless there were a particular reason for it. But it does not appear from any thing that is set forth in the declaration that the charter has given any directions, or the Company made any bye-laws, concerning the regulation of that particular branch of the trade of fitting the barrels into the stocks; and if not, no reason can be assigned why other persons may not do it as well, and should not be permitted to do it as well, as those who are members of the Company. Nor does it appear by the declaration that the particular marks which every person of the Company puts on his own barrels are an evidence that such barrels have been tried and proved by the Company, or that such marks may not be put on before they are tried and proved, or that there is any method whatsoever prescribed either by the charter or any bye-laws for trying and proving barrels made by members of the Company. And as we can presume nothing but what is set forth, we are obliged to be of

129; *Cudston v. Eastwick*, Salk. 193; *Wannell v. The Chamberlain of the City of London*, 1 Str. 675; *Bosworth v. Hearne*, 2 Str. 1085, 5 Andr. 91; *Harrison v. The Chamberlain of London*, 1 Burr. 12; *Green v. The Mayor of Durham*, ib. 127; *The King v. The Master and Wardens of the Surgeons Co. in London*, 2 Burr. 892; *The King v. Sir T. Harrison, Chamberlain of London*, 3 Burr. 1322; *Pierce v. Bartrum*, Coup. 269; and *The Butchers Company v. Morrey*, 1 H. Bl. Rep. 371.

(a) In truth it is only one bye-law, consisting of two branches.

(b) The bye-law is not so extensive; it merely restrains the members of the Company from selling barrels "to any person of the said art within the said city or liberties or four miles compass thereof" who is not a member.

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of opinion that this part of the bye-law likewise is not good, as being a restraint upon trade without an apparent reason.

The objection to the latter part of the bye-law, that a stop is to be made of proof until conformity or payment of the penalty, though we think it a good objection, affords no argument at all in the present case, because a bye-law may certainly be good in part (*a*) and bad in part; and this action is not founded on that part of the bye-law.

As therefore we are of opinion that the bye-law, on which this action is founded, is not good in either part of it, the two other objections become altogether immaterial; and therefore I shall say but very little upon them.

As to the objection that the breaches are not well assigned; we are rather inclined to think that the first breach is not well assigned, because it does not appear that the defendant was guilty of the fact there laid to his charge after he was a member of the Company, unless the day which follows after the words, to wit, be material (*b*); which we think it is not.

There are many cases in the books relating to this matter, but I think that no certain rule can be laid down concerning it, but the Judges must judge as well as they can from the nature of every particular case. I will mention only two instances to explain what I mean. In the case of an action on a promissory note, it is generally laid in the declaration that after the day of the making of the act, to wit, upon such a day such a note was made; in which case the very day set forth after the, to wit, is certainly material, because the same identical note must be proved; and it can be ascertained only by the date; and if it be of another date, it is another note. But in the case of a declaration in ejectment, where the demise is laid upon such a day, and the declaration goes on and says that afterwards, to wit, upon such a day the defendant ejected the plaintiff, this day is not material, because if the defendant ejected

(*a*) But see *Clarke v. Tuckett*, 2 Vent. 183.

(*b*) Vid. *Skinner v. Andrews*, 1 Saund. 169.

ected him upon any day after the day of the demise, it is sufficient. And if the day of the ejectment be laid to be before the day of the demise, it must always be rejected as repugnant and immaterial, but does not vitiate the declaration. But this objection only lies to the first breach assigned; for the second is right in this respect.

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But there is another objection that goes to both the breaches, that it is not laid that the defendant at the time of the breaches *knew the persons* there mentioned not to be members of the Company. Whether or no it is necessary that this should have been so laid, we give no positive opinion, because it is not necessary. To be sure, if it were in an indictment it would be necessary to lay it so; and we think at least that it would have been better if it had been so laid in the present case.

There is but one objection that remains, which is that the Company could not sue in their own name for these penalties, because there is no direction in the bye-law, and besides the penalty is not given to them but to other persons, that is, a moiety to the use of the poor of the Company and a moiety to the discoverer (a). But we are inclined to think that if the bye-law were good, and the breaches well assigned, the action might be brought in the name of the Company (b). *The Chamberlain of London's case*, 5 Co. 62. b., 1 Rol. Abr. 366. (C), and what is said in the case of *Player and Vere*, Sir T. Raym. 324, are very strong authorities in support of this opinion. But, as it is not necessary at present, we give no positive opinion upon this point.

Upon the whole therefore, though we were very much inclined (as far as justice would permit) to give judgment for the plaintiffs, being satisfied that they are a very useful Company

(a) The action could not have been brought by any discoverer; for though a body politic may make a bye-law, subjecting those who infringe it to a penalty, they cannot give an action to a stranger to recover such penalty. *Bodwin v. Fennell*, 1 Wils. 237; and *Totterdell and Harris, Masters of the Taylors' Co. at Bath*, v. *Glazby*, 2 Wils. 266.

(b) In the case of *The Master Wardens and Commonalty of Feltmakers v. Davis*, Bos. & Pull. 98, it was holden that the master wardens and commonalty of a company could not sue for a penalty forfeited to the master and wardens, to the use of the master wardens and company.

WILLIAMS qui tam against DREW

H. 16 Geo. 2.
Thursday,
Jan. 27th.

The stat. 18
Eliz. c. 5. f.
3., which
gives costs
to defend-
ants in po-
pular ac-
tions if the
plaintiff be
nonsuit, ex-
tends to sub-
sequent as
well as prior
statutes.

“ **M**OTION (a) for costs on the plaintiff's be-
sued. Action of debt for 200*l* by the plaintiff
mon informer on the stat. 15 *Car. 2. c. 8.* made to
butchers selling live cattle; penalty double the value
cattle; one half to the King, the other to the informer.
No costs given by the statute to the informer.
was pleaded; and the plaintiff was nonsuited at
Cornwall assizes.

The motion is grounded on the 18 *Eliz. c. 5.*
And the only question is whether that statute extends
forfeitures and penalties created by any subsequent

It was said that the statute of *Charles the Second*
only enforced the statute 3 & 4 *Ed. 6. c. 19.*, by enlarging
penalties and a little altering the nature of the offence.

It was said also that there is not one word in the
Eliz. which implies that it relates only to offences
before that time. And for the defendant was cited
case, *Hutt. 25*, which was in 17 *Jac. 1.* The
motion was on the 35 *Eliz. c. 6*, which was a total
act; and the question was whether the defendant
found not guilty (b) was entitled to costs; and it
that this statute 18 *Eliz.* was a perpetual direction
informer. *Doghead's case*, 2 *Leon. 116.* In
on the 27 *Eliz. c. 4*; plaintiff nonsuited; and it
that, the plaintiff not being a common informer,
defendant was not (c) entitled, but no objection
was on a subsequent statute. 2 *Keb. 106*; and
an indictment for compounding an offence.

statutes created by subsequent statutes; which shews that the former clause of this statute has been holden to extend to subsequent statutes, though there are no stronger words than in the present clause. *Harris* q. t. v. *Reeve* in 1742, 3. *Lamb* q. t. v. *Fetherston*, M. 10 Geo. 2. WILLIAMS
against
DREW.

Belfield desired time to shew cause. So rule nisi, which afterwards made absolute (a); *Belfield* saying "that he not oppose it."

Law q. t. v. *Werrall*, 1 Wilf. 117; *Carter* q. t. v. *Tooting*, M. 12 there cited; and *The Mayor, &c. of Plymouth v Werring*, post, S. P; also the case of *Wilkinson* q. t. v. *Ailot*, Corp. 366, where the plaintiff being nonsuited in an action on the stat. 21 Hen. 8. c. 13, for silence, it was holden that the defendant was entitled to costs, as it was objected that the stat. 18 Eliz. c. 5. did not extend to cases where a moiety of the penalty is given to the King.

JOHN COLEMAN against JOHN COOKE.

H. 16 Geo. 2
Thursday,
Feb. 10th.

THE following opinion of the Court was delivered by *Wilkes*, Lord Chief Justice. "Motion in arrest of judgment. The first count is on a promissory note dated 1st of May 1732, whereby the defendant promised to pay to *Henry Delany* or order 150 guineas ten days after the death of his father *John Cooke* for value received; which after the death of the father (which is laid to be the 24th of April 1741) was duly indorsed by *Delany* to the plaintiff. The second count is on a promissory note dated 15th of July 1732, whereby the defendant promised to pay to *Henry Delany* or order six weeks after the death of his father 50 guineas for value received; the like indorsement laid after the death of the father as before. The third count is for money had and received &c. 250*l.*: this is out of the case. The damage is laid at 300*l.*; and a general verdict for the plaintiff on both notes. A promissory note payable to *A.* or order after the death of *B.* is assignable under the stat. 3 and 4 An. c. 9; and consequently the indorsee may maintain an action upon it against the maker.

It was insisted (a) on for the defendant in arrest of judgment that these notes are not within the stat. 3 & 4 Anne c. 9;

(a) This case was several times argued.

1st, That the act of Parliament only intend promissory notes on the same foot as bills of exchange; that therefore, if bills of exchange drawn in this manner would not be good and consequently not assignable, it follows that notes drawn in this manner are not made able or assignable by the statute.

2dly, That the act was made for the advancement of trade and commerce, and consequently was intended to extend only to such notes as are in their nature payable, and that these notes are not so.

Before I consider these objections, I will state of the act of parliament on which the question depends, 3 & 4 Ann. c. 9. intitled "An act for a remedy on promissory notes as is now used on bills of exchange, and for the better payment of inland bills of exchange." Whereas it hath been held that notes signed by the party who makes the same, who person promises to pay to any other person or any sum of money therein mentioned, are not assignable or indorsable over within the custom of merchant, that any person to whom such note shall be assigned or made payable could not within the statute maintain any action on such note against the person first drew and signed the same, therefore to the encourage trade and commerce which will be advanced if such notes shall have the same effect as bills of exchange and shall be negotiated in like manner, be it enacted that all notes in writing which shall be made and signed by any person or persons, or

able, and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be according to the custom of merchants; and that the person or persons, &c. to whom the money is made payable by such note shall and maintain an action for the same in such manner as he or they may do upon any inland bill of exchange; and that the person or persons, &c. to whom such note is indorsed or assigned, or the money therein mentioned to be paid by indorsement thereon, shall and maintain his her or their action for such money either against the person or persons who signed such note, or against any of the persons who indorsed the same, in the same manner as in case of inland bills of exchange. The title of the act seems to refer to bills of exchange, and the words are likewise referred to in the preamble, and the remedy to be the same (a). But in the description of the notes which are to be made assignable there is no reference to bills of exchange; but the words are very general, and I understand that the plain words of an enacting clause are to be restrained by the title or preamble of an act (b). As indeed been often said, and I think very rightly, that the words of an act of parliament be doubtful, it may be proper to have recourse to the preamble to find out the meaning of the Legislature: but where the words of the enacting part are plain and express, I do not think that they ought to be restrained by the preamble; for the preamble only recite some particular mischiefs which have happened, but the enacting clause may not only be calculated to prevent those mischiefs but others also of a like nature. Now the words of the enacting part of this act are plain and clear and very general; and in order to bring a note within the description of that clause, it is only necessary,

1742, 3.

COLEMAN
against
COOKE.

1st,

a) It was taken for granted in *Tindal v. Brown*, 1 D. & E. 167; 1 D. & E. 186; both in the Court of King's Bench and in the Exchequer-Chamber, and solemnly decided in the cases of *Brown v. Harrington*, ib. 4 vol. 148, and *Smith v. Kendal*, ib. 6 vol. 123, (in which the sum of *Denison J.* in *Dextaux v. Hoot*, Bull. N. P. 274, and the determination in *May v. Cooper*, Fost. 376, to the contrary were over-ruled, that three days' grace are allowed on a promissory note (though it be a note payable to A. without adding "or to his order, or to bearer," *Smith v. Kendal*, 6 D. & E. 123) as well as on a bill of exchange, by reason of Stat. 3 & 4 An. c. 9., which puts them both on the same footing in respects.

b) Vid. *Copeman v. Gallant*, 1 P. Wms. 320; *Mace v. Cadell*, Gough. 1; *Pattison v. Bankes*; ib. 543; *Cox v. Liotard*, H. 24 Geo. 3. Dougl. 1. n. (55), 2d. ed.; and *Bradley v. Clarke*, per Buller J. 5 D. & E. 201.

And therefore, as to the first objection, that if a bill of exchange had been drawn in this manner it would have been good; supposing it to be true, I do not think it follows that these promissory notes may not be good by the general words of the statute, if they answer all the descriptions therein contained. However for a sake I will suppose that this consequence would follow, we do not think that a bill of exchange drawn in this manner would be bad. Upon this head it would be mispending time to run over all the passages which have been cited out of the civil law books in relation to bills of exchange, because I put a question to the counsel, whether they will think determine this point, whether there is any limited time mentioned in any of the books beyond which if bills of exchange are made payable they are void; and it was agreed by the counsel that they could find no such rule, and I am sure I can find none. But if a bill of exchange be made payable at never so distant a time, to be a day that must come, it is no objection to it. There is but one passage in the books wherein anything to the contrary is so much as hinted at; and that is in the *liber primus de commerciis*, where it is said that it had been objected against a bill of exchange, as contrary to the nature of it, that it was made payable at twelve or seven months: but by his making use of the word *promissory*, it is plain that in his opinion the law was not to be otherwise. If therefore the distance of time had not have made a bill of exchange bad if drawn

- 174: 3. 1st, That the note should be in writing;
 2dly, That it should be made and signed by the
 promising to pay;

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 against
 COOKE.

And 3dly, That there be an express promise to another or his order or bearer. But as to the time of payment, the act is silent, nor is there any particular prescribed.

And therefore, as to the first objection, that if a exchange had been drawn in this manner it would not be good; supposing it to be true, I do not think it follows that these promissory notes may not be with general words of the statute, if they answer all the descriptions therein contained. However for argument sake I will suppose that this consequence would hold we do not think that a bill of exchange drawn in this manner would be bad. Upon this head it would be mispending time to run over all the passages which have been cited out of the civil law books in relation to bills of exchange, because I put a question to the counsel, will I think determine this point, whether there is a limited time mentioned in any of the books beyond which if bills of exchange are made payable they are not good, and it was agreed by the counsel that they could find no such rule, and I am sure I can find none. But if a bill of exchange be made payable at never so distant a day, or be a day that must come, it is no objection to the bill. There is but one passage in the books wherein any author to the contrary is so much as hinted at; and that is in *chius de commerciis*, where it is said that it had been formerly an objection against a bill of exchange, as contrary to the nature of it, that it was made payable at the end of seven months: but by his making use of the word *merely*, it is plain that in his opinion the law was then to be otherwise. If therefore the distance of time would not have made a bill of exchange bad if drawn in this manner, since it is drawn at a time which must come, only other objection that was made on this head was in all bills of exchange there must be a *par pro pari*, and there cannot be in this case, because the value cannot be ascertained. But I shall shew plainly that the value may be ascertained, when I come to the other objection that bills are not negotiable notes.

Secondly; Having answered the objections against bills of exchange considering them on the same foot as bills of exchange
 I can

notes were always holden to be good, because though
 facts were not always holden at a certain time, yet it
 certain that they would be held. The case of *Andrews*
Ranklyn (a), *H. 3 Geo. 1. B. R.*, depends on the
 reason; for there the note was to pay such a sum two
 months after such a ship was paid off; and held good, because
 ship would certainly be paid off one time or other.
 case of *Lewis v. Ord (b)*, *T. 8 & 9 G. 2. B. R.*,
 exactly the like case, and determined on the same rea-

1742, 3.
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 COOKE.

As to the objection that these are not negotiable
 , because the value of them cannot be ascertained,
 argument is not founded on fact, because the value of
 when the age of a person is known is as well settled
 to be: and there are many printed books in which these
 valuations are made. But if it were otherwise, the life
 man may be insured, and by that the value will be
 maintained. And the same answer will serve to the objec-
 tion which I before mentioned against such bills of exchange.

There was another objection taken, that the drawer
 had died before his father, and then these notes
 would have been of no value: but there is plainly nothing
 in this objection, for the same may be said of any note
 payable at a distant time, that the drawer may die worth-
 less before the note becomes payable.

I do not think that the averment of the death of the
 drawer before the indorsement makes any alteration, because
 I am of opinion that if the notes were not within the
 statute ab initio, they shall not be made so by any subse-
 quent contingency. But for the reasons aforesaid we are
 of opinion (and so was the Lord Chief Baron *Parker*)
 that the plaintiff is entitled to his judgment (c); and there-
 fore the rule for arresting the judgment must be dis-
 continued (d)."

1 *Str.* 24.

(b) *Cunningh. Bills of Exchange* 113.

This judgment was afterwards affirmed in the Court of King's
 Bench on a writ of error. 2. *Str.* 1217.

See the following cases, in which the notes or bills of exchange
 were both on the same footing) were holden not to be good notes,
 because they were payable out of a particular fund or on a contin-
 gency; *Banbury v. Liffitt*, 2 *Str.* 1211; *Dawkes v. Lord Deloraine*,
Rep. 782; 3 *Willf.* 267; *Roberts v. Peake*, 1 *Burr.* 323; *Kingston*
v. M. 25 G. 3. B. R. *Bayley's Bills of Exchange* 71; and *Carlos v.*
Os. 5 D. & E. 482.—In these, the notes were holden to be good,
 because they were payable at all events; *Burchell v. Burchell*, 2 *Lord*
1545; *Evans v. Underwood*, 1 *Willf.* 262; *Paplewell v. Wilson*, 1
54; *Chadwick v. Allen*, 16 607; *Goss v. Nisbet*, 1. *Burr.* 220; and
Miller v. Hartjuck, 7 D. & E. 733.

1742, 3.

H. 16 Geo. 2.
Thursday,
Feb. 20th.

JONATHAN SCOTT and FRANCIA RICHARDSON
against ROBERT SURMAN SALEM OWAN and
JOHN CRUICKSHANK, Assignees of RICHARD
SCOTT a Bankrupt.

If goods be
consigned
to a factor
for sale, and
he sell and
receive the
money be-
fore his
bankruptcy
and do not
purchase
with it any
specific
thing capa-
ble of being
distinguish-
ed from the
rest of his
property,
the consign-
ors cannot
recover the
whole mo-
ney from his
assignees,
but must
come in un-
der the com-
mission.

—So if the
factor at the
time of the
sale agree to
set off a
debt of his
own due to
the vendee,
it is the

same as if the factor received so much money from the vendee, and the commission must come in under the factor's commission.

—But if the goods remain in specie in the factor's hands at the time of his bankruptcy, the consignors may recover the goods in trover from the assignees.

—Or if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had and received.

—So if the factor on such a sale take notes in payment from the vendee payable to him at a future day, and his assignees afterwards receive the money due on the notes, the principal may recover it from the assignees in an action for money had and received.

—If the assignees of a factor (bankrupt) receive bounty money on any article under an act of parliament giving the bounty to the importer, the consignors of that article may recover such bounty-money from them in an action for money had and received.

THE opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "Action on the case for money had and received. The plaintiffs being partners beyond sea consigned a quantity of tar to Richard Scott the bankrupt, brother of the plaintiff Scott, as their factor. There had been mutual dealings between the two brothers, which were then unsettled. The ship and goods arrived in the Thames from Carolina 22d March 1739. The factor received the bill of lading, and sold the tar on the 28th of March following to Cornelius and Jeremiah Owan; and it was agreed that the tar should be paid for in promissory notes payable four months after the delivery of the goods, and that a debt of 31l. due from the factor to the vendee on his own account should be deducted. 1st April 1740 the vendees gave the factor in part two promissory notes, one for 66l. 13s 4d., the other for 102l. 6s. 8d., which with the 31l. made up 200l. On the 3d of April 1740 the factor committed an act of bankruptcy, and a commission issued on the 5th on the petition of one of the defendants. The bankrupt delivered up the two notes to their assignees, and they have since received the money. They have likewise confirmed the sale, and settled the account with the vendees, and received the balance, being 378l. 4s. They have likewise received the bounty-money allowed by act of parliament to the importers, being 299l. 8s.

The defendants insist that as assignees they are entitled to all the money which they have received, and that the plaintiffs must come in as creditors under the commission.

The same as if the factor received so much money from the vendee, and the commission must come in under the factor's commission.

—But if the goods remain in specie in the factor's hands at the time of his bankruptcy, the consignors may recover the goods in trover from the assignees.

—Or if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had and received.

—So if the factor on such a sale take notes in payment from the vendee payable to him at a future day, and his assignees afterwards receive the money due on the notes, the principal may recover it from the assignees in an action for money had and received.

—If the assignees of a factor (bankrupt) receive bounty money on any article under an act of parliament giving the bounty to the importer, the consignors of that article may recover such bounty-money from them in an action for money had and received.

plaintiffs insist that, the bankrupt being only a factor, the money received on the notes, though payable to the bankrupt or his order, and likewise the money received of the vendees, and also the bounty-money, must be considered as money received to the use of the plaintiffs. The defendants paid the freight duty and other charges, with the commission amounted to 519*l.* 2*s.*

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against
SUTMAN.

The case was tried before me at Guildhall 27th of June and the question reserved (a) for the opinion of the Court was whether the plaintiffs are entitled to the 10*s.* for which the verdict was given, or to any and part thereof. The sum of 358*l.* 10*s.* arises from the produce of the tar. We did not consult my Brother *Justice A.*, he not being in Court at the time of the trial: but Lord Chief Baron *Parker* agreed in opinion with me, and has given me authority to say so, that the verdict ought to be for the plaintiffs for 327*l.* 10*s.* deducting 31*l.*, for which we are all of opinion that the plaintiffs only come in as creditors, it standing just on the same foot as if the bankrupt had received it in money before his bankruptcy.

We are not quite agreed in our reasons, though we all think that the verdict shall be for the plaintiffs for 327*l.* 10*s.*; therefore I will inform you in what we all agree, and in what there is some little difference between us.

There are three things in dispute;

- 1st, The money received on the notes;
- 2^d, The money received of the vendees as the balance of account;
- 3^dly, The 299*l.* 8*s.* received by the defendants on the bounty-money.

We all agree that the equity of the case is with the plaintiffs; and that therefore if the law were against the plaintiffs they would certainly be relieved in equity. The case of *Copeman v. Gallant*, 1 *P. Wms.* 314; of *Wise v. Vandeput*, 2 *Vern.* 203; of *Burdett v. Willet* in

D d

the

This case was twice argued on the 26th of May and 9th of November 1742 by *Skinner* and *Prims* King's Serjts. for the plaintiffs and by *King's* Serjt. and *Eyre* Serjt. for the defendants.

1742, 3. the same book 638; and of *Whitecomb v. Jacob*, 1 *Salk.* 16 are all clear and plain to this purpose. This point therefore cannot be disputed. And wherever the equity of the case is clearly with the plaintiff, I will always endeavour if I can, and if it be any ways consistent with the rules of law, to give him relief at law. And I found my resolution on a maxim in law, that the law will always avoid circuity of action if possible, to prevent trouble and expence to the suitors; and for the same reason I think à fortiori we ought to endeavour, if possible, to prevent suits in Courts of Equity. But to be sure no motive whatever is sufficient to warrant our determining contrary to law.

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against
SURMAN.

I will therefore in the next place consider what the law is. And there is a notion, I own, which weighs much with me to be of opinion with the plaintiffs, to which my Brothers are doubtful; and therefore as I believe it was never started before, I shall only just mention it and shall not rely upon it. My motion is that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estates of their ancestors and testators; but that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts (a). And I found this my opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point. As to the reason of the case, I rely here again upon the rule concerning circuity of action. For I think it would be very absurd to say that any thing shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them by which they will be obliged to refund and account, and according to the case of *Burdett v. Willett* will likewise have costs decreed against them, and so the effects of the bankrupt which ought to be applied to the discharge of his debts will be wasted to serve no purpose whatever. If therefore the bankrupt

(a) And it has been so ruled in several cases. *Ex parte Morp*, 1 *At.* 159; *Ex parte Butler*, *ib.* 213; *Cloplum v. Gullant*; 1 *Com. Dig.* 533; *Howard v. Fenner*, 3 *Burr.* 2369; *Winch v. Keeley*, 1 *D. & E.* 619; *Webster v. Seal*, 1 *M.* 25 *Geo.* 3. *B. R.* cited, *ib.* 622; and in *Farr v. Newman* 4 *E. & E.* 629. per *Gr. J.*

bankrupt were seized of a trust estate in lands, for the reasons ready mentioned I should think that it did not vest in the assignees at all, but that the legal estate as to that should remain in the bankrupt for the benefit of the cestui in trust. And as this notion is most consistent with reason and justice, so I think it is most agreeable to the statute 13 Eliz. c. 7., to which all the rest refer; for that is a statute which directs what real and personal estate of a bankrupt the commissioners have a power to apply towards the discharge of the bankrupt's debts, and nothing vested in the assignees by any of the subsequent statutes what the commissioners had a power so to dispose of. The words (a) of the statute of the 13 Eliz. are "the commissioners shall have power and authority to sell and dispose of such lands which the bankrupt had in his own right, and for such use and interest right or title as such bankrupt had in the same, and his or her money goods chattels wares merchandizes and debts." But as I believe the contrary notion has obtained, and as this is only my private notion, and my Brothers do not seem to be satisfied with it, and as we can determine the present question upon other points in which we are all agreed, I shall not at all rely upon this, but leave it to be considered better more fully another time, if it should ever come to be only point on which a case must be determined.

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against
SURMAN.

We are all agreed that if the money for which the tax had been sold had been all paid to the bankrupt before his
D d 2 bankruptcy,

/ The words of that statute are these, The commissioners shall have power and authority to take by their discretions such order and direction with the body of such person &c., "as also with all his or her lands tenements hereditaments, as well copy or customary hold as freehold, which he shall have in his or her own right before he or she became bankrupt and also with all such lands tenements and hereditaments as such person shall have purchased for money or other recompence jointly with his wife children or child to the only use of such offender, or of or for such next right or title as such offender then shall have in the same which he or she lawfully depart without, or with any person or persons of trust to the secret use of such offender, and also with his or her money goods chattels wares merchandizes and debts wheresoever they may be found; and by writ or process to make sale of the said lands &c." And by stat. 1. c. 15. s. 13. the commissioners "have power to grant and assign overwise to order or dispose of all or any of the debts due or to be due in the benefit of the said bankrupt by what person or persons soever, or at what manner and form soever, to the use of the creditors of the said bankrupt." &c.


1742 3. 1st, That the note should be in writing;
2dly, That it should be made and signed by the p
promising to pay;

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And 3dly, That there be an express promise to
another or his order or bearer. But as to the time of
ment, the act is silent, nor is there any particular
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And therefore, as to the first objection, that if a bill
exchange had been drawn in this manner it would not
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follows that these promissory notes may not be within
general words of the statute, if they answer all the
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sake I will suppose that this consequence would hold;
we do not think that a bill of exchange drawn in
manner would be bad. Upon this head it would be
mispending time to run over all the passages which
been cited out of the civil law books in relation to bills
exchange, because I put a question to the counsel, and
will I think determine this point, whether there is a
limited time mentioned in any of the books beyond which
if bills of exchange are made payable they are not good,
and it was agreed by the counsel that they could find
such rule, and I am sure I can find none. But if a bill
exchange be made payable at never so distant a time, it
be a day that must come, it is no objection to the bill.
There is but one passage in the books wherein any
to the contrary is so much as hinted at; and that is in
Ulpianus de commerciis, where it is said that it had been
held by an objection against a bill of exchange, as contrary
the nature of it, that it was made payable at the end of
seven months: but by his making use of the word
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there cannot be in this case, because the value is
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ascertained, when I come to the other objection that
are not negotiable notes.

Secondly; Having answered the objections against the
notes considering them on the same foot as bills of exchange.

other thing, if he do not lay out the money accord- 1742, 3.
 an action of debt will lie or an action on the case 
 much money had and received to A.'s use. So
alk. 9. Poulter v. Cornwall, if a man receive money **SCOTT**
 special purpose, and neglect or refuse to apply it **against**
 usea for which he received it, an action on the **SURMAN.**
 ill lie as for money had and received. And though
 in equity may be proper in several of these cases,
 action at law will lie likewise; as if I pay money
 ther to lay out in the purchase of a particular el-
 any other thing, I may either bring a bill against
 onsidering him as a trustee, and praying that he
 ry out the money in that specific thing, or I may
 an action against him as for so much money
 id received for my use. Courts of Equity always
 such bills when they are brought under a notion
 rist, and therefore in this very case have often
 relief where the party might have had his remedy
 if he had thought proper to proceed that way.

apply this general rule to the present case. The
 as having received this money which belongs to the
 ts and ought not to be applied to pay the bankrupt's
 they ought to have paid it to the plaintiffs, and
 ring done so, this action will lie against them for
 h money had and received to the use of the plain-
 But I need not rely on the general rule only, for
 y point now in question has been twice solemnly
 ined. First, in the case of *Gurratt v. Cullum (a)*,
Inne, B. R. which was thus. The plaintiff being
 and employed *Burtwell* and *Mason* as his factors in
 to sell goods for him, which he had sent to them.
 ell a parcel to *J. S.* for 20*l.* the plaintiff not know-
 whom they were sold, nor *J. S.* whose goods they
 but they were delivered to him as the goods of *B.*
 by a bill of parcels and charged to their account
 r books mutually. *B.* and *M.* before payment
 bankrupts, and their debts are assigned by the com-
 ers to the defendant, who afterwards receives the 20*l.*
 The plaintiff brought an action for money had and
 d to his use; and this matter being referred by *Holt* for
 nion of the King's Bench, judgment was given on
 argument

1742, 3. argument for the plaintiff. Afterwards at *Guildhall*
 Lord Chief Justice *Parker*, this case was cited and
 ed to be law, because though it was agreed that p:
 by J. S. to *Burtwell* and *Mason* with whom the c
 was made would be a discharge to J. S. against the
 pal, yet the debt was not in law due to them, but
 person whose goods they were, and therefore it w
 assigned to the defendant by a general assignment o
 debts, but remained due to the plaintiff as befor
 being paid to the defendant who had no right to hav
 must be considered in law as paid for the use of
 whom it was due, and so an action will lie as for
 had and received to his use.

SCOTT
 against
 SURMAN.

There were, I think, but two objections of
 made on the other side. First, That the notes being
 to the factor must be sued for in his name, and had disch
 the former debt. But this is otherwise; for the pl:
 were not obliged to accept such notes, neither do the
 charge the former debt either in respect to the plaint
 the factor. They do not discharge the former debt, b
 they only create a debt of an equal nature: but it
 have been otherwise if a bond had been given; and
 was held in the case of *Cumber v. Wane* (a), P. 7
B. R. where a note given in discharge of a debt for
 sold and delivered was pleaded to an action brought
 on the note but) for the goods sold, and held to be no
 plea being of the same nature as the first debt: but
 bond had been given, held it would have been a disch:
 and this judgment is founded on several former resolut
 If indeed these notes had been actually negotiated, it n
 have been otherwise, because then it must have been
 sidered as if the money had been received; besides inno
 persons might be prejudiced: but that is not the pre
 case.

The other objection was that a factor by virtue o
 general authority cannot sell on credit: if he do, it is
 his own risk, and the owner is not obliged to accept
 vendee as his debtor; and that it does not in the pre
 case appear that he had any special authority. And
 this purpose several passages were cited out of the civil l
 books of the nature of a factor. To this I shall give m
 answer

(a) 1 Str. 426.

s; 1st, that the nature of dealing is now quite al- 1742, 3.
 of which Courts of Law must take notice; for con-
 and daily experience shews that factors do sell upon
 without such a special authority. If it were other-
 it would be the greatest prejudice to trade, as it
 be likewise if this notion should prevail that the
 must suffer by the factor's becoming bankrupt; and
 it always as much as we can and as far as is consistent
 is rules of law to do every thing to promote the trade
 commerce of the nation. Another answer likewise
 : given, that a man may in many cases either consider
 r as a wrong-doer or as a receiver of money for his
 he thinks best and most for his advantage; and there-
 the nature of a factor were as is alledged, yet even
 : case the owner may come either against the vendee
 factor at his election; and the plaintiffs by this ac-
 ive chosen to confirm the sale.

SCOTT
 against
 SUMAN.

I therefore as we think that there is nothing in these
 ions, upon the reason of the thing, the general rule
 has always prevailed in parallel cases, and these two
 n point, we are clearly of opinion for the plaintiffs as
 : two first sums: and as to the last we think that it
 much stronger for them; for as the bounty-money
 ot belong to the plaintiffs or become due to them by
 of any contract made by the factor, but as it is
 by several acts of Parliament to the importer (a)
 er received this certainly received it for the use of the
 iffs, who were the owners and importers of the goods.

are therefore of opinion that the judgment ought to
 the plaintiffs for 327*l.* 10*s.*, and ordered the verdict
 judgment to be entered up according to the rule for that
)."

Vid. stat. 3 & 4 Ann. c. 10.

Vid. *Toote v. Hollingworth*, 5 D. & E. 215. and 2 H. Bl. Rep. 501.

1743.

E. 16 G. 2
Wednesday.
April 27th.

WILLIAM DAWES Assignee of DINGLEY ASKHAM
Sheriff of the County of HUNTINGDON against
WILLIAM PAPWORTH Esq.

It is sufficient for the assignee of a bail-bond to state in his declaration that the sheriff assigned the bond to him according to the form of the statute, without adding "that the assignment was under the hand and seal of the sheriff;" for under that general allegation he must prove that it was under hand and seal &c. To such a declaration the defendant may plead that the sheriff did not assign &c. according to the form of the statute, and the plaintiff may traverse the plea in those words.

"DEBT on a bail-bond given to the sheriff 19th of June 1742 in the sum of 263*l.* 6*s.* 8*d.* It was agreed that every thing previous to the assignment is rightly set forth in the declaration; and then it goes on and says, that the said *Dingley Askham* on the 29th of June 1742 by a certain endorsement upon the bond assigned and set over the same to the plaintiff according to the form of the statute in that case made and provided, by force whereof &c.

The defendant pleads that *D. Askham* did not assign the said bond to the plaintiff according to the form of the statute in that case made and provided &c.; and the plaintiff tenders an issue thereupon.

The defendant demurs, and shews for cause of demurrer, that the replication puts both matter of law and matter of fact in issue to be tried by a jury, to wit, the matter of fact of the writing obligatory being assigned, and the matter of law, the legality of its being assigned according to the statute.

The plaintiff joins in demurrer; and upon this demurrer it comes now in judgment before the Court

Agar for the defendant took two objections; 1st, to the declaration, that the plaintiff had not set forth that the assignment was under the hand and seal (a) of the sheriff, as it was expressly directed to be by the stat. 4 & 5 *An. c.* 16. s. 20. (b); and that therefore

(a) In truth it was stated on the record to be under the seal of the sheriff; "he the said *D. Askham* sheriff of the county of *Huntingdon* aforesaid afterwards, to wit, on the 29th day of *June* in the year of our Lord 1742 at *Cambridge* aforesaid at the special instance and request of the said *William Dawes* plaintiff in this suit by a certain endorsement upon that writing obligatory which the said *William Dawes*, (sealed with the seal of the said *D. Askham* in the presence of two credible witnesses to wit &c.) brings here into court, bearing date &c. by the name of *D. Askham* sheriff of the said county of *Huntingdon* assigned and set over unto the said *William Dawes* &c."

(b) Which enacts that the sheriff or other officer at the request and costs of the plaintiff in such action, or his attorney shall assign to the plaintiff in such action the bail-bond or other security taken from such bail, by indorse the same and attesting it under his hand and seal in the presence of two or more credible witnesses &c."

before the plaintiff had not set forth enough to support his action; and he compared it to an award, which if it were to be under the hand and seal of the arbitrators was as good if only under their seal, for which purpose he cited *Gro. Jac. 277. Sallows v. Girling*; and 2 *Mod. 77. Lambel v. Columbel*. He also compared it to a power of execution, which if it were to be by deed under the hand of the party, or to be executed in the presence of two witnesses, if it be not under the hand of the party or not attested in the presence of two witnesses is void; and for this purpose he cited *Palm. 109*; and 112; 1 *Bulstr. 110*; 88 *v. Scott*, 1 *Lutw. 538*. The second objection was that the issue, that matter of law and matter of fact were put in issue, which he insisted was wrong; and for this purpose cited *Hob. 104*.

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DAWES
against
PAR-
WORTH.

Draper for the plaintiff insisted that saying that the assignment was secundum formam statuti was well enough, and that this was the constant form. He said likewise that there was a great deal of difference between a bare or idle authority and an authority coupled with an interest; and that the cases cited were only in respect to the extinction of powers or authorities which were not coupled with interests.

But I think this no answer to the objection; for all the essential circumstances must be observed in the execution of authorities coupled with interests.

But we were all of opinion (Brother Fortescue A. present in court) that there was no weight in either of these objections.

As to the first, we thought this the best way of declaring, though declarations sometimes are otherwise, because the plaintiff must prove, to shew that the assignment was according to the statute (a), that it was under the hand and seal of the sheriff; and therefore the cases which were cited upon this point, though all admitted to be law,

are

(a) The same point has been ruled on another part of this clause in the 2. Though the statute requires the indorsement to be made by the sheriff in the presence of two witnesses, it is not necessary to set out their names in the declaration stating the assignment, or even to state that it was indorsed in the presence of two witnesses. *Robinson v. Taylor, Fort. 366*; *Wise v. Box, 1 Wils. 121*; *R. Higon v. Taylor, Tr. 13 Geo. 1. ib. 122*. It is sufficient to state generally that the sheriff at the request and costs of the plaintiff assigned the bond to the plaintiff according to the form of the statute. *Miffin v. Sir W. Morgan, 2 Lord Raym. 1564*. Indeed in *Neat v. Mills,*

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DAWES
against
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are not at all parallel, since the plaintiff in this case not recover unless he produce in evidence an assign under the hand and seal of the sheriff.

As to the second objection, we denied the rule; for it is no such rule that matter of law as well as matter of fact may not be put in issue if complicated with the matter of fact; for matter of law is put in issue in most issues. It comes in question upon non est factum: non dimisit; favit vel non; seoffavit vel non; nay even upon non assuetudine since infancy may be given in evidence on that issue. The rule is that a mere matter of law, or a consequence of law, cannot be put in issue by itself. If it were otherwise, it would be very hard to give judgment against the plaintiff in the present case, because he has only traversed literally the defendant's plea; so if the issue were won the first fault was in the defendant.

So judgment (a) was given for the plaintiff *per Curiam*.

v. *Mills, Fortesc.* 371. where it was alleged in the declaration the bail-bond was assigned in the presence of one witness, *St. J. Weaver*, who held ill: but there, according to the plaintiff's own shewing, the bond was not assigned according to the form of the statute.

(a) A writ of error was brought in this case, and was reversed See *Tr.* 16 & 17 *Geo.* 2. *Rol.* 785. *B. R.*

RAYNER *against* POINTER.

E. 16 G. 2.
Wednesday
April 27th.

THE plaintiff declared in debt; and there were several counts. The defendant demurs generally to the declaration in this manner;

Though a plaintiff or defendant pray a wrong judgment, the Court must give such judgment as the party is entitled to. And therefore if the defendant, in a demurrer to a declaration,

And the defendant prays judgment of the declaration *aforsaid*, because he says that the said declaration and matter therein contained are insufficient in law for the *Henry* to have or maintain his action against the *John*, and that he is not under any necessity nor bound by the law of the land to make any answer to the said declaration, and this he is ready to verify; whereupon default of a sufficient declaration in this respect the *J. Pointer* prays judgment of the declaration *aforsaid* that the same may be quashed &c.

The plaintiff joins in demurrer; and on this demurrer it came before the Court.

Prime for the plaintiff. No one for the defendant.

It pray judgment of the declaration and that it may be quashed, and the plaintiff joins in demurrer, and the declaration being good, the Court will give judgment in discharge of the plaintiff.

I conceived a doubt at first whether we could give judgment in chief, the demurrer only praying judgment of the declaration both at the beginning and the end. And therefore at first I only gave judgment nisi, that I might consider of it: but upon consideration and talking with my brethren we made the rule absolute on the 29th. For though it might be otherwise in the case of a plea framed in this manner (concerning which as yet I have no settled opinion), on a demurrer thus worded judgment must be in chief, because there is no such thing as a demurrer in tement. If therefore it be considered as a demurrer in tement, it is void, and so the plaintiff for want of answer on the part of the defendant is entitled to a judgment in chief: if it be considered as a proper demurrer, is entitled to the same judgment (a). And though a plaintiff pray a wrong judgment, the Court must give such judgment as he is entitled to by law (b).

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against
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Vid. 2 *Saund.* 361, *Sacheverell v. Froggatt*, *ib.* 150. *Ib.* *Pinckney v. The Inhabitants of East Hundred in Rutland*, where the demurrers are exactly in this form and judgment is given in chief. See also *The case of Dominique v. Davenant*, 1 *Salk.* 220; 6 *Mod.* 198. (c)."

a) See also *R. v. Sir Oliver Butler*, 3 *Lew.* 322, 3; and *Leaves v. B. & C.*, 3 *Mod.* 132.

b) See *Campbell v. French*, in error, 6 *D. & E.* 200, and the cases cited; and *Addison v. Overind*, 6 *D. & E.* 766.

c) And *Bullyiberpe v. Turner*, *E. 17 Geo. 2. post.*

PADFIELD against CABELL and Others.

Trin. 16 &
17 G. 2.
Friday,
June 17th.

On an action of trover for taking the plaintiff's goods the defendants pleaded the general issue, and at the trial at Nisi in *Somersetshire* before Mr. Baron Abney a special verdict was reserved for the opinion of this Court.

A warrant of distress granted by two justices under stat. 9 G. 2. c. 23, which refers to 13 Car. 2. c. 24. s. 45. on a conviction for selling spirituous liquors without a license, need

The defendants, constables, seized the goods in question in virtue of a warrant signed by two justices of the peace, which was recited that the plaintiff had been convicted before them in the penalty of 100*l.* but which they mitigated to 10*l.*, for having unlawfully sold and retailed spirituous liquors in less quantities than two gallons

without a license, need

under the seals of the justices: it is sufficient if it be under their hands. Bull. N. S. C.

and *Gapper* Serjt. for the defendants; and after the Court delivered their opinion in favour of the

Willes, Lord Chief Justice (a). This defends the statute 9 *Geo. 2. c. 23*: but as that refers stat. 12 *Car. 2. c. 24. s. 25.*, it must be determined that statute. There the words are "to award out warrants under their hands for the levying of forfeitures, penalties, and fines." Now a *warrant* *ex vi termini* imply an instrument under seal; no more than an *authority*. All the books, in which it is said that a warrant must be under seal, are for the case in the Year Books, *H. 14 Hen. 8. fo. 16.* it is said that a justice of peace is a judge of record; hath a seal of office; and that the inferior office sees the seal must give credit thereto (c). Lord Hale in his 2d *Inst.* 52, 591, 592, speaks only of warrants committed by judges of record; so does Lord Hale 460. and 577., and he refers to the case in 14 *Hen. 8.* adds that some have thought it sufficient if it be subscribed by the justice. *Dalton*, p. 401., says that a warrant or precept in writing ought to be under their seal, or under their hand at least. And he produces instances of warrants only under hands; one by the Chancellor *Ellesmere* for a contempt, *A. D. 1607*; the Chief Justice *Popham* in 3 *Jac. 1.* There are also two precedents of warrants by justices only under hands. The case of *Aylesbury v. Hurvey* (d), 3

is also strong as to this purpose. A strong argument too arises from the different penning of different acts of parliament; in some of which a warrant is directed to be made under hand *and seal*, whereas the section of the act on which this question arises only speaks of a warrant *under their hands* (a). Of the former kind are 6 Geo. 1. c. 21; another section (b) even in this very act, 12 Car. 2. c. 24. by which a power is given to the commissioners in another instance to be executed by them by writing *under their hands and seals*, which shews that the present is not *casus omisus*.

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against
CARELL.

Postea to the defendants.

passed by justices of the peace on a conviction on the excise laws, to levy 20s.; and in answer to an objection taken to the plea that the warrant was not pleaded with a protest, *The Court* said "The statute does not require that the warrant be *under hand and seal*, but only in writing; and no writing is to be so pleaded, except it be a deed &c."—From the proceedings in this case, which are in *Lev. Entr.* 152. it seems probable that there was a conviction on this very statute 12 Car. 2. c. 24. s. 29 and 30; and in the plea as there set forth the warrant to levy the penalty of 20s. is stated to be *only under the hands* of the justices.

(a) See also the preceding statute, 12 Car. 2. c. 23., another excise act, where power is given to the commissioners (sect. 31.) "to award and *issue out warrants under their hands* for levying of such forfeitures, penalties, and fines" &c.

(b) Sect. 33.

THOMAS SOLLERS Clerk *against* RICHARD LAWRENCE Clerk and ELIZABETH his Wife.

Trin.
16 & 17 G. 2.
Wednesday
June 22d.

THE opinion of the Court was delivered, as follows, by *Willers*, Lord Chief Justice. "Debt. The plaintiff declares upon the judgment of five of the commissioners, who cord of limited jurisdiction, sufficient must be set forth to shew that they had jurisdiction to give the judgment; and if sufficient be stated for that purpose, it will be intended that they acted right unless the contrary appear upon the record. By stat. 15 Geo. 2. c. 16. for rebuilding Blandford then lately burned down, commissioners were appointed (who were made a court of record) to settle all differences and demands &c. between all persons their heirs executors administrators successors or assigns touching the building &c., and authority is given to them to direct any alterations in the foundations of the new houses, by taking or giving ground from one to another, and ordering satisfaction to be made by one to the other &c. &c.; under this act the Court ordered the sum of 1000l. to be paid by A. the executor of the late vicar of B. (whose house was burned down in his lifetime) to C. the succeeding vicar; held first that the order was conclusive on A. personally, though it did not appear on the record that A. had received assets to that amount; 2dly, that C. might maintain debt against A. for that sum; and 3dly, that A. could not plead to such action a bond-debt of the testator still unpaid and no assets ultra.

If a parsonage or vicarage-house be destroyed without any default in the incumbent, the Ecclesiastical Court usually orders a fifth part of the profits of the living to be set out for rebuilding.

In an action
founded on
the judgment of a
Court of record of limited jurisdiction,

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SOLLERS
against
LAW-
RENCE.

who are made a court of record, and are appointed to hear and determine all differences and disputes touching and concerning the rebuilding of houses and other buildings in the town of *Blandford* burned down or demolished by the late dreadful fire by an act made 5 Geo. 2, c. 16.

The declaration sets forth that a court was holden at the *Crown Inn* in *Blandford Forum* before five of the commissioners (naming them), and that upon reading the petition of the plaintiff *Thomas Sollers*, setting forth that by the late fire the vicarage-house and out-houses belonging to the parish of *Blandford* aforesaid were burned down and not rebuilt in the lifetime of *Thomas Riley* Clerk, who was then vicar and in possession thereof; that the said *Thomas Riley* died in the month of *November* 1736, soon after which his daughter, the defendant *Elizabeth*, then *Elizabeth Morecraft*, possessed herself of all his personal estate, which was very considerable, either as his executrix or administratrix; that since the plaintiff has been instituted and inducted into the said vicarage, which was in the month of *February* in the year 1736, he had applied himself to the defendants *Richard* and *Elizabeth* either to rebuild the said house and outhouses, or make him satisfaction for dilapidations on account of the loss sustained by the said dwelling-house and outhouses being consumed, which amounted to 360*l.* or thereabouts, but could obtain no reasonable satisfaction; it further set forth that the garden belonging to the said house and the ground whereon the house &c. stood had been taken away for public uses by order of that Court, and therefore prayed that the defendants might be compelled by an order or decree of that Court either to rebuild the house and outhouses or make such satisfaction out of the personal estate of the said *T. Riley* deceased to the petitioner for dilapidations as might enable him (with the money already decreed as a dividend of the charities given to that town) to rebuild the said house &c., and that such a reasonable allowance might be made to the petitioner for the ground taken away as the Court should think fit; upon which petition the Court did then order and decree that the defendants should within three months from the time of notice of this order pay or cause to be paid to the plaintiff the sum of 100*l.*; which the Court did
adjudge

&c.; and from and after payment of the said
d. to the plaintiff the Court did order that the
their executors administrators and assigns and
tenements goods &c., and the lands tene-
s &c. of the said *T. Riley* deceased, should be
ere by the said order discharged and indemni-
ll actions and suits for dilapidations on account
vicarage-house &c. being burned down and
as aforesaid; and the said Court did further
a reasonable satisfaction should be made to
ff for the ground taken away from the
ge as aforesaid; as by the said order &c.;
l order still remains in full force and ef-
n the least reversed vacated annulled dis-
satisfied; and that the defendants afterwards
of *August* 1740 had notice of the said order,
on thereof still remains to be done, and the
F hath not been yet paid or satisfied the said
part thereof; whereby an action hath accrued to
ntiff to demand and have of the said defendants
l., yet the said defendants, though often re-
e not nor hath either of them paid to the plain-
100l. or any part, but refuse to pay the same;
iff's damage, 20l &c.

ndants, protesting that the said declaration is
n form &c., plead that *T. Riley* in his lifetime,
of *October* 1700 by his writing obligatory be-

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SULLIVAN
against
LAW-
RENCE.

the value of 10*l.*, which are not sufficient
said debt due on and by the said writing on
which are subject and liable to the payment
and this they are ready to verify, and pray

The plaintiff demurs generally; and the de-
in demurrer; and on this demurrer it comes
ment before the Court.

It was agreed (a) that the plea is bad in its
1st, Because a bond debt cannot be pleaded so
2dly, Because the defendants are not sued
in their own right.

The question therefore only is whether it
be sufficient to support this action, and this
these two points;

1st, Whether there is sufficient set forth
the commissioners had a jurisdiction;

2dly, Whether, supposing that they had, it
fused the directions of the act of parliament
them that jurisdiction and have given a right
These two questions must be determined by
ferent rules of law.

As to the first, the rule is, that nothing
tended in favor of their jurisdiction, but this
pear by what is set forth on the record
such a jurisdiction (b).

As to the second; the rule is, that if the
diction, every thing must be intended in
judgment, and that they must be taken
right, unless the contrary appears by any
forth on the record. And as both these
depend on the words of the statute which
jurisdiction, I will in the first place state the
in the act which are relative to this purpose.

By the first section several persons there
five of them (and the persons who gave this
five of those persons) are made and constituted
cord summarily to hear and determine all differ-
mands whatsoever which have arisen or may be

(a) This case was three times argued.

(b) Vid. *Ladbroke v. Temu*, sup. 1799.

1743.
 PROPRIETORS landlords tenants or late occupiers of any
 houses or buildings burned down or demolished or
 destroyed by reason of the fire, or between any person or
 persons having or claiming any estate right title or interest
 in or equity charge or incumbrance in to or upon the
 premises or any of their heirs executors administrators
 assigns or any other persons, touching or con-
 cerning building or not building the said houses buildings
 premises, or for or concerning any covenant condition
 or duty relating thereto, or any rate or contribution to
 be paid by any person or persons interested in the
 premises and all incidents relating thereto." In sect. 4.
 "better regulating the new building of the said de-
 stroyed or damaged houses or buildings, "the said Court
 by the authority of this act have power to order and
 make any alterations in the foundations thereof by taking
 up ground from one to another or otherwise as shall
 be judged expedient for the better rebuilding
 of said towns, and shall and may appoint what sum
 of money or other satisfaction shall be paid or made by the
 persons having benefit by such alteration unto the
 persons who shall have any loss thereby, and
 their heirs executors administrators successors
 assigns shall for ever hereafter hold and enjoy what
 is ordered and directed by the said Court." In
 "In case the proprietors or owners of the houses
 destroyed or damaged by the fire their heirs executors ad-
 ministrators successors or assigns shall not within four years
 after the 25th of March 1732 lay the foundation of their
 houses or buildings to be rebuilt, and shall not within the
 time to be limited by the said Court rebuild and finish the
 same, upon such default the said Court shall have power
 by their order and decree to dispose of the
 land so unbuild and of all courts &c. thereunto to such
 persons or persons their heirs executors administrators
 assigns and assigns as will rebuild the same according to
 the respective interests of the persons so neglecting or re-
 fusing to rebuild the same, and shall and may appoint
 what sum of money or other satisfaction shall be made or
 paid to the person or persons so making default as afore-
 said, and the soil &c. so disposed of to the undertaker to
 rebuild shall for ever hereafter remain unto the rebuilder
 his

1743. his heirs executors administrators and assigns in such manner as the Court shall have ordered the same."

SOLLERS
against
LAWRENCE.

It is plain that by the words of this act a very extensive jurisdiction is given to the commissioners; for they may determine disputes between all persons whomsoever which have arisen *or may arise* touching the repairing building *or not building* any houses or buildings in *Blandford* burned down or damaged by the late fire, and touching any rate or contribution to be borne or paid towards the rebuilding of the same; and by the seventh section in case of default of the owner to rebuild, they may take away the ground from him, and gave it to another, making him a proper satisfaction, and by the fourth section, though he be guilty of no default at all.

Now the present dispute was certainly concerning a house in *Blandford*; a house burned down by fire; and concerning the building or not building of the same. They seem therefore plainly to have a jurisdiction.

The only objections were,

1st, That this dispute did not subsist at the time of the act of parliament:

2dly, That the commissioners could not in this case order the executors to pay money for rebuilding the vicarage-house, when the ground on which it was to be rebuilt was taken away.

As to the first: the dispute, in order to give them a jurisdiction, need not subsist at the time of the act; for the words are "which have arisen *or may arise*." Nor need the parties be in being at that time; because the words "heirs executors administrators *successors* and assigns" are in every one of those clauses in the act which give them a jurisdiction. There is nothing therefore in this objection.

The second seems rather to be an objection to the judgment, and more proper to be made use of on that head. But supposing it to be an objection to the jurisdiction, it receives this plain answer, that the petitioner prays money for rebuilding, that the money decreed is ordered

by the Court to be laid out in rebuilding, and that ecclesiastical Court would oblige them to do it; and ground is taken away by the decree of the Court, it be intended that they have pursued the statute and right, and have either given the vicar a new piece of ground or satisfaction in money which is the same for if they have, he must lay it out in the purchase of a piece of ground for that purpose. Besides it does not appear by the record whether the ground was taken away in the lifetime of the late vicar or not. If it were there is an end to the objection. If it were, it will not be to the same thing; for either it was taken away by virtue of the fourth or seventh section; if by virtue of the fourth, it was by his default in not rebuilding the house, he must be sure neither he or his representatives shall be allowed to take advantage of his default. If it were taken away by virtue of the seventh clause, it will come to justice; for if *Riley* had been sued, he could not have said, "I cannot rebuild because the ground is taken away;" his plain answer would have been, "he may have more ground for asking, or money to buy ground, the commissioners must give it to him by virtue of the same clause which authorised them to take it away." If therefore he cannot ask for it, it is his own default, and no one can take advantage of his own neglect or laches. We think it is very clear that the commissioners had a jurisdiction. And if they had, it will not be very difficult to give judgment, since we cannot adjudge it to be otherwise unless any thing appears on the face of it to shew that

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SOLLERS
against
LAWRENCE.

to the objections to the form of the proceedings, as it does not appear that the parties were summoned to have an opportunity to make a defence, and some other things of this sort; this being a court of record, it is the rule that these things need not be set forth, but it be intended that the Court proceeded regularly the contrary does not appear.

the merits; the only objections are, that this house being burned in the general conflagration, and it not being pretended that *Riley* was in default, therefore he was not obliged to contribute to rebuild the house, and consequently his representatives

1743. presentatives could not be obliged; for as they stand or
 in his place they cannot be liable farther than he was.
 2dly, It was said that if he were obliged, no suit could
 be brought against his executors or administrators, for
 that *actio personalis* (as this is) *moritur cum persona*.
 3dly, It was objected that there was no foundation for
 the rule and measure of damages, which the commissioners plainly went by, to give the fifth part of the profit during the life of *Riley*.

SOLLERS
 against
 LAWRENCE.

These being questions properly belonging to the Ecclesiastical Courts, and the books which were cited being very dark in relation to these matters, it was thought proper to hear civilians, and from the best lights that we could get from them the objections seem to be of no weight. To be sure if *Riley* were not liable, his executors or administrators were not.

It is proper therefore to consider in the first place whether he was liable. It is certain that if a parsonage or vicarage-house be burned down, there must be some way of rebuilding it for necessity's sake and the good of the public: for there must be parsons and vicars, and they must have houses to live in; it follows therefore that when they are burned down they must be built up again. If a suit be brought *ex officio* in the lifetime of the incumbent (and it must be so because no one is interested to bring it), *Dr. Paul* informed us that the constant rule is to order the fifth part of the profits of the living to be set apart in order to rebuild the house. This must plainly be for necessity's sake and when the incumbent is in no default; for if he be in fault, he ought (as in the general case of excommunications) to pay the whole. Several cases were cited by *Dr. Paul* to this purpose; the case of the Deanery-house and the Chancellor's house at *Chichester*, and the case of the vicarage-house of *Worminghall* in *Berkshire*; which though not cases directly in point yet plainly shewed that the Ecclesiastical Courts usually went by this rule, and they founded their determinations on the injunctions of *Ed. VI.* and *Queen Elizabeth*, and an injunction of *Archbishop Cranmer*, enforcing the same and ordering them to be observed; which though perhaps not strictly law were very proper measures for the Ecclesiastical Courts to govern themselves by, when they otherwise must judge arbitrarily.

about any rule at all. As therefore the commission-
 e under a necessity of giving some damages, as this
 equitable rule, as it is observed in the ecclesiasti-
 ts and founded on the authorities before mention-
 as the common law is quite silent in relation to
 utter, I do not see what better rule the commissi-
 ould govern themselves by. Therefore the first and
 ections seem to be of no weight.

1743.

SOLLERS
against
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the second, that the action will not lie against
 cutors though there might be a remedy against
 it is contrary to all the rules laid down concerning
 tions and the constant practice in relation to suits
 fort; for both in the ecclesiastical and temporal
 since these suits have been retained here (a), mul-
 of suits, nay most of them, have been against the
 rs or administrators, and have been always holden
 ood, because it is not considered as a tort in the
 , but as a duty which he ought to have performed,
 refore his representatives, so far as he left assets,
 equally liable as himself. And for this reason, it
 ontrary to the rule that *actio personalis* (which is
 understood of a tort) *moritur cum persona*; as
 on the case for all sorts of debts and duties are now
 ought against executors, though this was formerly
 l. But the law has been now so settled at least
 rs. (b)

think therefore that the commissioners had a jurif-
 ; and as nothing appears upon the record to shew that
 ve determined wrong, we must intend that it ap-
 before them that the testator left assets, otherwise
 y would not have made a personal decree against
 endants; and therefore we are of opinion that
 at must be for the plaintiff."

—N. I and my Brother *Burnett* only were present
 at the time of giving this opinion; my Brothers
Fortescue

was formerly doubted whether any action could be brought in
 non law courts for dilapidations: but that point has been confi-
 settled ever since the case of *Jones v. Hill*, 3 *Lev.* 268. And
 tion may be maintained by a prebendary, as well as by a parson
 against his predecessor. *Radcliffe v. D'Oyley*, 2 *D. & E.* 630.
 or *Hambly v. Trott*, *Cowp.* 371, where it was holden that trover
 lie against an executor for a conversion by his testator; and in
 to Lord Mansfield, after examining all the authorities, stated the
 his inquiries, by distinguishing between those causes of action
 d those that do not, survive against the executor.

1743. *Fortescue A. and Abney* not having heard the arguments: but Lord Chief Baron *Parker*, who heard the arguments and consulted with us, gave me authority to say that he was of the same opinion."

SOLLERS
against
LAWRENCE.

M 17 Geo. 2 SAMUEL MEAD Esq. *against* LUKE ROBINSON Esq.
Thursday,
Oct. 20th.

"*SKINNER* moved on behalf of the defendant, for a new trial upon the misdirection of the Judge, and on the ground that the verdict was contrary to evidence. It was an action of debt for 4000*l.* on the 2 *Geo.* 2. c. 24. s. 1. and there were eight counts in the declaration: 500*l.* each. The verdict was for the plaintiff on the third count for 500*l.*; and for the defendant on the seven others.

The defendant in the third count was charged with corrupting one *John Billany* on the 1st of May 14 *Geo.* 2. *Billany* having at that time and at the time of the election a right to vote in the said election, to give his vote for the defendant and *Francis Chute* Esq. at the election of members of parliament for the borough of *Heydon* in *Yorkshire*, by giving him ten guineas in money as a gift or reward for his the said *Billany* giving his vote as aforesaid in the said election, contrary to the statute &c.; and that the said *Billany* by reason thereof did give his vote for them at the said election, whereby &c.

The seventh count was similar to the third, except that it charged the defendant with bribing *Billany* by his agent *P. Ward*.

The objections were, First, that Mr. Serjt. *Birch*, who tried the cause, permitted the plaintiff to give in evidence several particular instances of other persons being bribed by the defendant not named in any of the counts in the declaration (a).

Secondly,

the returning officer of a borough, to proceed to an election, is admissible in evidence to prove the allegation in a declaration that such a precept issued &c.

(a) But this is the account of that part of the evidence given by Mr. Serjt. *Birch*, who tried the cause; "In the course of this evidence one few burgesses were named who had received money on their votes either from *Ward*, or from *Moore* or *Fairbridge* as under-agents to him; and this arose in some measure on the cross examination, on the witnesses being asked by the defendant's counsel whether they would take upon them to name any one burgess who had money lent to him by *Ward*, *Moore*, or *Fairbridge*."

, That he permitted a copy of the poll to be
denied, though *Fowle* the Mayor had the original
was served with a subpoena and a duces tecum
tiff, and was ready to have given his evidence
produced the poll (a).

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against
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that he admitted *P. Ward* to be a witness,
was particeps criminis, and so swore to excuse


, That he admitted *Billany* himself, though
the same objection

That the evidence did not support the verdict on
want; it being only proved by *Ward* that he
persons ten guineas a-piece and *Billany* among
id took their notes for the money, but mention-
of the election nor for whom they were to
it was not the money of the defendant, nor
of it till the *Michaelmas* after the election,
on the 6th of *May* 1741, when in an account
em the notes were delivered to and accepted
money; and it being proved by *Billany* that
about that time to pay 18*l.* in town and
ten guineas of one *Fr. Moore* (b) to whom
note payable to the said *Fr. Moore* or order,
there was not a word mentioned of the
) ; and that he apprehended he should be
called

was this correctly stated by the defendant's counsel. Mr.
report on this head was as follows; " Mr. *Waterland* the
as called to give some account of the election without pro-
ll: but this being objected to, the plaintiff's counsel offered
nce which was taken by Mr. *Dawson* by the town-clerk's
is not being signed by the Mayor, or taken by his direction,
t ought not to be read. Mr. *Coulthurst* thereupon produced
n called a copy, taken from the original poll: he said he
val at the defendant's house under the Mayor's hand; that
himself at his own house in the Mayor's presence examined
copy with the original twice over, the witness assisting him
copy was then signed by the Mayor, that it might be pro-
House of Commons; that when he came away the original
nds of the defendant, who said it might be wanted in the
et he had not seen it since. Mr. *Coulthurst* proved a notice
nt to produce the original poll. Mr. *Roberts* proved a notice
to produce it; and on his appearing, the plaintiff's coun-
nt in the original poll, but he said that he would not, and
d to produce it; and so was not sworn. The defendant's
ed to the reading of this copy: but I was of opinion on
vidence it might be read, it seeming to me to be a duplicate
authority with the original."

dear-agent of *Ward*.

ording to Mr. *Serjt. Bireb's* report, the evidence of *Ward*
not was strong to shew that *Billany*, as well as the other
ten guineas as a bribe, and that the note was only given as
transaction; according to the evidence of *Cannel*, " The
is had given were to be burned the day after the election."

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ROBINSON. be called upon for the money; and that therefore as the third count is a personal charge on the defendant, there was no foundation on this evidence to find a verdict against him on that count."

—A special case was reserved on another point made at the trial, and a motion was also made by *Droghda* Serjt. in arrest of judgment.

The motion for a new trial came on to be argued on the 25th and 26th of *November* 1743, and was supported by *Skinner*, *Prime*, and *Willes*, King's Serjeants and *Droghda* Serjeant, and was resisted by *Belfield*, *Wynne*, and *Both*, Serjeants, when the Court over-ruled all the objections, except the last: but thinking that a question of great importance, it was referred to the consideration of all the Judges.

In answer to the first objection, they said it was not competent to the defendant to object to the evidence given by the plaintiff's witnesses of money having been given by the defendant's agents to other voters, that evidence having been given on the cross examination, and in consequence of questions put by his own counsel.

Secondly, That the poll given in evidence was properly received; for that, as it was signed by the Mayor, it might be considered as an original; (a) or if it were only an examined copy, it was admissible in evidence as such; on the same ground as copies of books of a public nature, registers of births marriages and burials; and that perhaps even parol evidence of voting was admissible. And they relied on a case, *R. v. Hughes*, *H. 1 Geo. 2. B. R.*, in which after great debate and on the authority of several cases there cited, the copy of the poll of the election of a Mayor was holden to be good evidence.

To the third and fourth objections several answers were given; 1st, That two years had elapsed since the offences were committed, and therefore that neither *Ward* or *Bell*

(a) Vid. *R. v. Davis*, 2 Str. 1048.

y could be prosecuted under the act (a); 2dly, But even the offences had been recently committed, *Ward* and *Billany* could only be considered as accomplices (b), and such they were competent witnesses: 3dly, That in particular case the Legislature by holding out inducements and offering an indemnity (2 Geo. 2. c. 24. s. 8.) to officers to discover and bring other offenders to punishment impliedly made the discoverers legal witnesses. And y relied on a case of *Phillips v. Fowler* (c), 8 Geo. 2. in which Lord Chief Justice *Eyre* had admitted an accomplice under the same circumstances as *Ward* and *Billany* to be a witness.

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With regard to the fifth objection;—The conclusion of Serjt. *Birch's* report, after setting forth all the evidence, was thus; “I stated the evidence to the jury with my observations thereupon and upon the act of parliament occurred to me, and the jury found a verdict for the plaintiff for 500l. as to the bribing of *Billany*, and for the defendant as to the residue; and the verdict was taken upon the third count (d), the jury declaring that what was done by the defendant's agent with regard to *Billany* they considered as done by the defendant himself.” The case, referred to the consideration of all the Judges, stated Mr. Serjt. *Birch's* report, adding “The Judge having reported that there was no evidence of the defendant's bribing *Billany* himself, and that there was a variety of evidence as to bribing him by *P. Ward* his agent, and the jury having found

(a) But they might still have been prosecuted as for an offence at common law.

(b) Vid. *R. v. A. Rockwood*, 4 St. Tri. 663; *R. v. C. Cranburne*, ib. 698; and *R. v. Robins* and *Atwood*, by all the Judges, on a case reserved at the Highwater summer assizes, 1788.

(c) Cited in *Say. Rep.* 291. The same point was also decided in *Bush v. Rolling, Say.* 289. So in a prosecution for penalties under the stat. 9 Geo. 2. c. 14. s. 5. the loser of money at cards is a good witness to prove the same; *R. v. Luckup*, M. 9 Geo. 2. B. R. MS. Mr. J. Wm. Fortescue—So, in a prosecution for the penalty of 500l. under stat. 23 Geo. 2. c. 13. s. 1. seducing artificers to go out of the kingdom, the prosecutor is a competent witness, though he be entitled to a moiety of the penalty; *R. v. W. Johnson*, on a question reserved at the Kingston spring assizes 1784 for the consideration of all the Judges.—See also *Abrahams q. t. v. Bunn*, 4 Burr. 2251; and *Smith q. t. v. Prager*, 7 D. & E. 60.

(d) It seems extraordinary that the question submitted to the consideration of all the Judges should ever have been raised, because it is evident from the Judge's report that the jury did not intend to confine their verdict for the plaintiff to the third count, but that they wished to leave to the Court to enter up a proper verdict on the facts found by them, which would have warranted the officer in entering up a verdict on the third count; and even the entry of the officer might afterwards have been altered by the Court from the Judge's notes.

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found that the defendant did not bribe *Billany* by *P. Wa* his agent by finding him not guilty on the seventh count the question is whether there was sufficient evidence support the verdict for the plaintiff on the third count?"

This question having been argued before all the Judges a majority (a) of them were of opinion that the plaintiff was entitled to retain his verdict, and the motion for new trial was discharged.

The special case, that had been reserved at the trial was then argued in the Common Pleas; and it was a point of evidence. "On behalf of the plaintiff the under-sheriff produced the precept itself mentioned in the declaration under the seal of the office of the sheriff signed and returned by the mayor to the sheriff together with the indenture, which indenture without the precept was returned with the writ by the sheriff; the under-sheriff proving the practice there to be not to return the precept along with the indenture. It was objected on the part of the defendant that the precept together with the indenture ought to have been returned and filed in Chancery, and that a copy of the precept on record ought to have been produced."

This case was argued on the 23d of April 1744 before Serjt. for the plaintiff and Prime King's Serjt. for the defendant, when

The Court said "It was not laid in the declaration that the precept was returned, but only that such precept issued and therefore they were all of opinion that the evidence produced

(a) All the Judges, except Mr. J. Fortescue Aland and Mr. Barr Carter, assembled at Serjeants' Inn to hear this case argued by *William Draper* Serjeants for the defendant, and the *Solicitor-General* and *Abney* Serjt. for the plaintiff; and on the 8th of February being again assembled at Lord Chief Justice Lee's chambers they gave their opinions *seriatim* Lord Chief Justice B. R. Parker Lord Chief Baron, and *Chappin Wright*, and *Denison*, Justices of the King's Bench, and *Reynolds* and *Clarke*, Barons, were of opinion with the plaintiff; and *William Lee* Chief Justice C. B., and *Abney* and *Burnett* Justices of C. B., were of a contrary opinion—"And the next day the Chief Justice (*Willes*) declared that he thought that the Court of Common Pleas were bound by the opinion of the majority of the Judges, and against the opinion of this Court gave the rule that the verdict as to the question above stated should not be set aside, but should stand." MS. *Abney* J.

luced was sufficient; and that there was no occasion
 ew that it was returned. They thought likewise that
 original was better evidence than the copy. How-
 it being strongly insisted on by the counsel for the
 ndant, the Court gave them leave to speak to it again
 next term."

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was accordingly spoken to again in the *Trinity* term
 wing, on the first of *June*, by *Wynne* Serjt. for the
 tiff, and *Willes* King's Serjt. for the defendant, when
 Court, retaining their former opinion, ordered the
 a to be delivered to the plaintiff.

fterwards, on the 7th of *June*, the motion in arrest
 judgment was argued. The objection was that it was
 directly alleged in the third count that the defendant
 the ten guineas to *Billany* for the purpose of bribing
 to give his vote, but only that he gave him that sum
 a gift or reward for *Billany's* giving his vote &c." But

be Court were clearly of opinion that this objection
 not well founded; for that *as* was in many cases an
 ment (*a*), and traversable; that it was to be construed
 rding to the subject-matter to which it was applied,
 that here it was used in the same sense as *for* a gift or
 rd; and that the third count would have been suf-
 nt without these words.

So the plaintiff had judgment.

/ Vid. *Eaton v. Southby*, H. 12 Geo. 2. sup. 134., and the cases there
 id to.

FANN against ATKINSON.

M. 17 G. 2.
 Thursday,
 Nov. 10th.

CRIME moved to set aside a judgment entered up pur- Court re-
 suant to a warrant of attorney executed not quite a fused to set
 before, because the party (defendant) died before the aside judg-
 ng of the judgment. The judgment was signed ment sign-
 her 1st, and the defendant died the 27th of September ed after
 re. death of de-
 fendant, be-
 cause a
 judgment
 of the pre-
 cedent term
 had when de-
 fendant was
 alive.

at The Court denied the motion, because the judg-
 : was a judgment of the precedent term; and this
 had when de-
 fendant was
 alive.

1743.

FANN
against
ATKINSON.

had been so determined before several times both in the Court and the Court of B. R. (a)."

(a) "*Savil v. Wiltshire* executor of *Wiltshire E.* 19 Geo. 2.—The tator died in *Essex* about forty miles from *London* on the 20th of *April* 1744; judgment was signed against him on the next day by virtue of warrant of attorney, dated 4th *March* 1741; *Easter* term in 1744 he was on the 11th of *April*; and the rule was made on an affidavit that the tator was alive on the 19th of *April*.

To set aside this judgment affidavits were read, stating that the testator died on the 20th of *April* 1744, on a day subsequent to the day of signing the judgment; and all the cases in *Hall v. Mof.*, *T.* 16 & 17 C. in this court were cited. But

The whole Court, conformably to the opinions of this Court and *B.* in all the cases, refused to set aside the judgment; and were of opinion that the statute 29 Car. 2. c. 3. strengthened this case; for that it was drawn by Lord Chief Justice *Hale*, and provided only for judgments affecting land in case of purchasers, leaving them in all other cases in the course of the Court, when though entered after the death of the party they have relation to the first day of the term if signed in term, if out of term to the first day of the preceding term. Nay, as *Abney J.* served, in the case of lands they affect the land from the day of the actual signing by the officer, and which may be after the death of the party. Vide the words of the stat. 29 Car. 2. c. 3. s. 14. And it seemed to *J.* that though the statute prevents a retrospect of judgment in favor of purchasers, it doth not in favor of the heir of the consignor of the judgment." MS. *Abney J.*—*Barnes* 270. S. C.

Nor is there any difference in this respect between adverse judgments and those signed under warrants of attorney. "*Joseph Hall v. A. Mof.* 16 & 17 G. 2. *Mof.* died intestate on the 16th of *February* last; an interlocutory judgment was signed 21st of *February*. It was insisted that as the case was an adverse suit, it was irregular, on a motion by *Draper* to set aside the judgment; and he cited 8 & 9 W. 3. c. 11. s. 6; 6. 142., and *Salk.* 315.

Burnett J. In *Norton v. Oliver* in this court *T.* 15 & 16 Geo. 2. after the death of the plaintiff his executors signed an interlocutory judgment, the Court refused to set it aside.

Abney J. mentioned the case of *Fuller v. Jocelyn* (1), executor of *T.* 3 & 4 G. 2., and *M.* 4 G. 2. *B. R.* *Troisden* on the 10th of *April* gave a warrant of attorney to confess a judgment, and died on the 1st on the 22d of *April* the plaintiff signed his judgment, and on the 15th took out execution, the term beginning on the 15th of *April*: the Court on consideration and on the authority of *Parsons v. Gill*, *Far* 93; *Salk.* 87, 401; refused to set aside the judgment.

Willes Ch. J. I see no difference between voluntary and adverse judgments: if there be any, the case of an adverse judgment is stronger. Is there any difference between plaintiffs' executors and defendants'?

Draper Serje. then said that there was no administration at all, as there were two *nihil*s returned on a *scire facias* in this case. And he said there could be no administration when the *scire facias* issued, for it was within less than fourteen days after the intestate's death.

But the Court held the judgment regular in the case now at bar.

See statute 29 Car. 2. c. 3. s. 21.—*Poulson v. Francia* (2), *T.* 13 G. 2. A *scire facias* was brought by *Elinor Poulson* administratrix of *George Poulson* against *Francia* to revive a judgment recovered by the testator against the defendant; and the *scire facias* alleged the death of *Poulson* on the 1st of *March*, and the administration granted on the 14th days of the intestate's death.

(1) 2 Sir. 882; and R. p. temp. *Hardw.* 158. by the name of *Falk* *Johnson*.

(2) *Lill. Entr.* 405.

the same month. On demurrer it was objected that by the stat. 29 Car. c. 3 administration ought not to be granted until fourteen days after death of the intestate.—*Curia*, contra. Administration may be granted immediately, otherwise the effects may be wasted and embezzled. Judgment for the plaintiff. *E. 13 An. Rot. 45. B. R.*" M3. *Abney J.*—*FANN* *against* *ATKINSON* 1743.

to the principal point, see also *Bragner v. Langmead*, 7 D. & E. 20, in which all the former cases on this subject are collected.

LINDON *against* COLLINS.

M. 17 G. 2.
Saturday.
Nov. 19th.

REPLEVIN; avowry for a rent-charge; the plaintiff was nonsuited.

An avowant for a rent-charge is not entitled to double costs under 11 G. 2. c. 19. s. 22, when the plaintiff is nonsuited.

A motion for double costs on the stat. 11 G. 2. c. 19. s. 22. (a). The only question was whether a rent-charge be within the words or intention of that clause in the statute which gives double costs in case the plaintiff be nonsuited &c. being a new case, we ordered it to be moved again, and the statute to be looked into and well considered (b).

It was objected likewise that, the defendant having avowed specially, and not taken the benefit of the statute, the case was not within the statute; but the Court thought there was nothing in this objection."

(a) By sect. 22. "After reciting that great difficulties often arise in king avowries or consuance upon distresses for rent, quit rents, reliefes, tithes, and other services, it is enacted &c. that it shall be lawful for all landlords in replevin to avow or make consuance generally that the plaintiff in replevin or other tenant of the lands and tenements whereon the distress was made enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, such rent was then and still remains due, or that the place where the distress was taken was parcel of such certain tenements held of such lord &c. for which tenements the rent relief heriot or other service defined for was due, without further setting forth the grant tenure demise title of such landlord, lessor or owner of such manor; and if the plaintiff in such action shall become nonsuit, discontinue, or have judgment given against him, the defendant in such replevin shall recover double costs of suit."

(b) Though it does not appear from Lord Chief Justice *Willis*'s papers in this case was determined, it appears from Mr. Justice *Abney*'s MS. that the rule, calling on the Prothonotary to review his taxation of (single) costs, was afterwards discharged; the Court being of opinion that though the statute was in some clauses remedial in others it was penal; and that the clause in question, sect. 22, which was a substantive clause, did not in any way include rent-charges, and that as it was a penal clause it ought not to be extended by construction.

It has been since holden that an avowry for a seizure for *heriot custom* is within this clause of the statute. *Lloyd v. Winton*, 2 Wilson 28; nor an avowry for a rent-charge under a canal act. *The Leominster Canal Company v. Norris*; 7 D. & E. 500; and *The Same v. Cowell*, R. f. 561. 233.

1743.

M. 17 G. 2.

Tuesday,

Nov. 22d.

FENN on the Demise of RICHARDS *a*
MARIOTT.

A custom in
a manor,
that the
grantee of a
customary
estate
(which will
pass either
by sur-
render or
deed and
admittance)
must be ad-
mitted dur-
ing the life
of the gran-
tor, is good
in law.

“**R**ULE nisi for a new trial. *Boote* for the
contrà.

Mr. J. *Burnett* reported from Mr. J. *De*
tried the cause at the last *Carlisle* assizes that the
in question were a customary estate, which
either by deed or surrender, but that even in
of a deed an admittance was necessary. Al-
proved in the cause that the grantee of the de-
present case, under whom the defendant claimed
admitted until after the death of the grantor. T-
was evidence on both sides as to the custom
instance of any person's being admitted after the
the grantor but one in 1732. But he thought
strength of the evidence was for the defendan-
ever the jury found a verdict for the lessor of the
who claimed as heir at law.

And it was insisted that a custom that the pa-
be admitted during the life of the grantor was a
custom; for that by law a surrenderee might be
after the death of the surrenderor, for which we
case from *Coke*. And other cases might have be-
for to be sure this is undoubted law.

But we thought the present case not at all p-
that; because that depends on the general law of
in respect to customary estates, but this on the p-
custom of the manor. For customary or copyhold
will not pass by deed, unless there be a particula-
to warrant it; and if there be, such deeds must be
with such circumstances as the custom requires; and
jury here, by finding for the plaintiff, have found
the custom was as much as if they had found it by
verdict, we are of opinion that such custom is good

It was insisted that such custom was unreasonable
and that in the present case it was unjust, because

(a) See *Perryman's case*, 5 Co. 84.

on the trial that the grantee was a purchaser for a
e consideration. 1743.

FINN
against
MANIOTT.

to this we answered that we thought it neither un-
ble nor unjust. It is fit that such grantees should
itted in some reasonable time, and the custom hath
that time. And if the purchaser be prejudiced by
t being admitted within that time, he may thank
f; for it was his own fault; for he should not have
is money until his purchase was completed by his
ance. And a person claiming under a bargain and
ay as well complain of injustice, if he do not inrol
n deed, under which he claims, within six months,
ch omission it becomes void."

Bailiffs and Citizens of the City of LITCH. M. 17 G. 2.
LD against JOHN SLATER, Assignee of CATH. Monday,
18 Widow. Nov. 28th.

opinion of the Court was delivered, as follows, by It is no ob-
jection after
er, Lord Chief Justice. "The action is an action verdict that
nant; in which the plaintiff declares in the county an action of
nant; in which he brought his action upon a cove- covenant
rd, in which he brought his action upon a cove- for not re-
an indenture made the 10th of March 1713, be- pairing &c.
e bailiffs and citizens of the city of Litchfield and the was
th. Adie, by which (as set forth in the declaration) and tried in
ideration of the surrender of a former lease of the a foreign
s for the term of sixty years bearing date the 8th of county, that
er 1656, and in consideration of the rents and cove- defect being
ere mentioned and reserved, the said bailiffs &c. the stat. 16
l to the said Catharine all that messuage burgage or & 17 Car.
it with the appurtenances in the said city of Litch- 2. c. 8.
a certain street there called Tamworth Street, and
&c., then in the occupation of the said Catherine,
the premises from the 8th of November then last
the term of 60 years under the rent of 3l., payable
rly at Lady-day and Michaelmas; and Catharine
ts for herself her executors administrators and as-
pay the rent and to keep the premises in repair,
and

1743. and to leave them so at the end of the term; *tl*
 The Bailiffs *rine* entered and was possessed; and afterwards t
 &c. of the 10th of *October* 1723, assigned (a) all her in
 LITCH- the term to the defendant, who entered and has
 FIELD since possessed, the reversion belonging to the
 against And the plaintiffs aver that 21*l.* for rent was du
 SLATER. day 1742, and assign that as their first breach
 the premises were out of repair during the conti
 the term and after the assignment (of which at
 several instances,) and this they assign as anothe
 and lay their damages at 200*l.*

The defendant pleads that the premises are sit
 and being in the city of *Litchfield* and the cou
 same city, and that the defendant after the
 made to him and before the bringing of this su
 25th *March* 1735, at the city of *Litchfield* afore
 county of the same city surrendered up the sai
 and all the residue of the term to the said bailiff
 zens, and that they then and there accepted of
 and saith that at the time of the said surrende
 was then due or in arrear; and that from the t
 said assignment to the time of the surrender
 kept the premises in good repair according to the

The plaintiffs reply; and protesting that the
 such surrender, traverse the acceptance, and os
 is joined; and a verdict was found for the p
 the *Stafford* assizes.

And the defendant having moved (b) in arrel
 ment, it stands now for the judgment of the
 that motion. There was but one objection to
 the cause was tried in the county of *Stafford*
 it ought to have been tried in the county of
Litchfield. The question therefore is whether
 mis-trial or not; and this will produce two que

First, whether it would have been bad at com

(a) In covenant (which runs with the land) evidence that
 ant is in as *heir* will support a declaration charging him as *offi*
v. Cusance, 4 D. & E. 75.

(b) The case was argued on the 20th of *June* 1743 by *St*
Serjt. and *Boole* Serjt. for the plaintiffs, and by *Droper* and *St*
 for the Defendant.

Secondly, Whether or not, if it would have been bad common law, it be aided by the 16 & 17 Car. 2. c. 8. s. 1. as for the other statutes of jeofails, we think that it is helped by any of them. As for the Stat. 4 & 5 An. 6. s. 6. which was relied on to make this a bad trial, think it is quite out of the case; for as the statute was made to extend the statute Car. 2. farther than it before and to remove a difficulty which plaintiffs laboured under by reason of challenges for defaults intruders, it is putting a strange construction upon say that plaintiffs by that statute were put under greater duties than before. But barely reading the words themselves will shew that no such construction as is contended ought to be put upon them. The words are "And as great delays do frequently happen in trials by reason of challenges to the arrays of pannels of jurors and jurors for default of hundredors, for prevention of for the future be it enacted that from and after every venire facias for the trial of any issue in any action or suit in any of her Majesty's Courts of Record at Westminster be awarded of the body of the proper county in which such issue is triable;" the meaning of which is only this that for the future venires shall be awarded of out of the county without any regard to hundredors, gave no directions in what counties issues are to be tried but left the law just as it stood before in respect to manner. Having laid this statute out of the case, I only say this farther before I come to the merits of the cause, that we ought in this case to go as far as we can in order to make the verdict good, both because the cause has been fairly tried, and likewise because it has been tried in a county where the defendant was more likely to get justice done him than if it had been tried in the city of the city of *Litchfield*, the bailiffs &c. being

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shall now come to the two points on which the question depends. And

first, we are of opinion that this trial would have been bad common law, if not aided by the statute 16 & 17 Car. 2. We think that actions of covenant for nonpayment of rent or not repairing are local actions. The case *Walker v. Damer* as it is reported in 1 *Salk.* 80. seems an authority as to this point. But that case is re-

F f

ported

1743. reported differently in other books (a); and it is very doubtful whether in that case any judgment was ever given. And the contrary was held in the case of *Smith v. Bates* Cro. Jac. 142., and in several other cases. However, be that as it will, and whether they are local actions or not when brought by the covenantor himself against the covenantor himself, yet there can be no doubt in the present case, the action being brought against an assignee not as he is in privity of contract but only as he is in privity of estate. As therefore it appears upon the pleadings that the premises lie in the county of the city of *Litchfield*, we think that the action by the rules of the common law ought to have been tried there (b). But if it had stood on the declaration only, this objection would not have arisen; for the premises there are only said to lie in the city of *Litchfield*; and though we are to take notice judicially of counties, we cannot judicially take notice of the boundaries of counties, nor that the whole city of *Litchfield* lies within the county of the city. But the objection arises from the plea, it being there alledged and not denied by the plaintiffs that the premises lie in the county of the city of *Litchfield*.

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As to the objection that the surrender and acceptance were in the county of the city of *Litchfield*, we do not rely much upon it, because though it is held in 2 *Rel. Abr.* 611. (c) that if the surrender of a lease be pleaded in another county the cause shall be tried there, I am not satisfied of the authority of that case (d). But if it were law, the case was determined before the statute 2. Jac. 1. c. 13. f. 2., which has enacted that no verdict shall be stayed or reversed if the venire be awarded from any of the places where any part of the matter in question arises. And therefore we think that, if there were no other objection, this statute would cure it, but for the other reason we think that this trial would have been bad before the statute 16 & 17 *Car.* 2.

Secondly,

(a) Vid. *Carth.* 182; 3 *Mol.* 337; and 1 *Show.* 191. S. C.

(b) But see *The Mayor &c. of London v. Cole*, 7 D. & E. 587. per Lord *Kingsdown* Chief Justice cont. and per *Grove J.* 588. accord.

(c) *Pl.* 33.

(d) In *Baileys's* case, 7 Co. 2. a., this rule was laid down "In all cases where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, there the plaintiff may choose to bring his action in which of the counties he will."

; The only question therefore that remains is, whether the statute will help it, or not. And a new case upon this statute, we should doubt whether this statute would help it, and for my part I should be of opinion that it did not. The statute are, "If there be a verdict, judgment not be stayed or reversed for that there is no error, so as the cause were tried by a jury of the county or place where the action is laid." And in words I am of opinion that the statute was intended to cure these defects where the cause was tried in an improper county, but only those cases where the venue was wrong, which meant no more at that time than that the jury were not returned de vicineto, or that there were no hundredors returned: the statute expressly says that it must be tried in the county; and I think that the word *laid*, which has been insisted on, will not bear the construction now put upon it. But I admit that the authority of them on the other side; and therefore as to give a judgment not founded on our own authority only on the strength of authorities, it will be necessary to mention all the cases which have been on this head. The first case that I can meet is the case of *Craft v. Boite*, 1 *Saund.* 247. P. B. R. There the action, as in the present case, was tried in a wrong county; and *Keeling* Chief Justice, *insford* J. and *Morton* J. held that it was helped by the 16 & 17 *Car.* 2: But *Twissden* J. was of the contrary. But *Saunders* says that judgment was given for the plaintiff against the opinion of many others. The next is the case of *Naylor v. Naylor* &c. P. 26 *Car.* 2. B. C. 1 *Mod.* 198., where the question was started but it was not the point on which judgment was given. But the Judges said that the trial was in a wrong county, the statute 16 & 17 *Car.* 2. would not help it, for that it was intended to be tried where the action was laid in the proper county, where it ought to be laid, which the word *proper* in the statute shews. The next case is that of *Jennings v. Hunkin*, H. B. R. 2 *Lev.* 121., where the action was tried in an improper county, and it was insisted that it was helped by the said statute: but *Hale* Chief Justice said that the true intent and meaning of the statute is if the cause be

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tried in a county where the matter in issue to be tried arises; for it cannot reasonably be supposed that the parliament intended to alter the course of trials and to have things tried in foreign counties where the jury are strangers to the parties, to the evidence, and to the matter in issue: but the intent of the statute was to cure trials and improper venues taken in the same county where the matter ought to be tried; and the rest of the Justices agreed that this was a reasonable construction of the statute, but said that they would advise on it; and *Ventris*, who reports the same in his first vol. 263., says that afterwards on further consideration and upon the authority of the case in *Saunders* and another case adjudged the very same term in *B. C.* the Court gave judgment for the plaintiff; it being within the words, though they still said it was not within the meaning of the statute. In the case of *Adderley and Wife*, *H. 37* and *28 Car. 2. B. C.* (and which I believe is the other case that *Ventris* hints at) reported in *2 Lev. 164.* it was held by Lord Chief Justice *Vaughan* and the whole Court that though the cause was tried in an improper county, yet that it was helped by the express words of the statute, because it was tried in the county where the action was brought. In the case of *Drew v. Barkdale*, reported in *1 Show. 343. M. 3 W. and M. B. R.* it was said per *Holt* and the whole Court that the trial being there in a wrong county was helped by the statute *16 & 17 Car. 2.*: but this case is very shortly reported as to the point. The last case which I shall mention, and which is the case which I must rely on, is the case of the *Lad Calverly v. Sir R. Leving*, *P. 10. W. 3. B. R.*, reported in *Comb. 4-2.* and *Carth. 448*, but best and most fully in *Lord Raym. 1 vol. 330.*; and therefore I shall state it as it is there reported; and it is a case of great authority and exactly the same as the present. It was an action of covenant for not repairing a house in the county of the city of *Chester*, and it was tried by the Chief Justice of the county of *Chester*. The case was very roughly argued; and *Chefbyre* for the plaintiff cited many authorities and (inter alia) a case between *Jew and Brigg* adjudged (as he said, since the Revolution, where the case arose in *Surry* but was tried in *Middlesex*; and it was judged by three Judges against the opinion of Lord Chief Justice *Holt* that this was aided by the statute *16 & 17 Car. 2.*; and on a writ of error brought in *Cam. Sec.* all the Judges, except Truly Chief Justice, *Powell*, &

Latham

achmere, were of opinion to affirm the judgment; and afterwards *Treby* declared in *B. C.* that he would submit to the opinion of his Brothers. And though the construction was very difficult to be maintained if it were *res integra*, yet since there were so many authorities for its construction, he desired that the plaintiff might have judgment; and *Holt* likewise afterwards said that he would conform to so many authorities, though he believed that they could not be maintained by reason; but in respect to the multitude of cases he complied, and judgment by the whole Court was given for the plaintiff.

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I think therefore that we are fully justified in the opinion that we should have been of concerning the construction of this statute if this were *res integra*, as Lord Chief Justices *Hale*, *Holt*, *Treby*, and so many other great men were of the same opinion with us; and I think we are likewise justified in giving our judgment contrary to our own opinions, since there are so many authorities on the other side; for nothing can be a greater inconvenience than that the law should be always uncertain, which yet must be the case if the Courts of *Westminster-Hall* did not think themselves bound in cases where there are so many authorities as there are in the present case. And I own on my own part I the more willingly come into this opinion, because the justice of the case is certainly on this side; and if I had been to draw the statute 16 & 17 *Car.*, I would have drawn it in such words as would have borne this construction. The rule therefore must be discharged, and the plaintiffs must have their judgment (a)."

—"N. Mr. Justice *Fortescue A.* was not present ther at the argument or giving the judgment."

(a) The same construction has also been put on the stat. 16 & 17 *Car.* in a subsequent case, *The Mayor &c. of London v. Cole and others*, E. 1 Geo. 3. 7 *Durnf. & East* 583, in which the above case was not cited.

1743.

M 17 G. 2.
Monday,
Nov. 28th.

TURNER *against* HORTON.

[Hil 16 Geo. 2. Rol. 311.]

THE following opinion of the Court was given by

Wilkes, Lord Chief Justice. " This comes on before the Court on a motion (a) for full costs, notwithstanding the 21 Jac. 1. c. 15.

The action is an action on the case for words. There are eight sets of words in the declaration. The plaintiff sets forth that he is by trade a baker, and all the words are laid to be spoken of him in respect to his trade, and as so spoken all of them are actionable. Special damages are laid that two persons (naming them) who used to deal with the plaintiff and give him credit refused to deal with him and give him credit by reason of the speaking of these words.

A general verdict for the plaintiff and two pence damages. I tried the cause last *Hilary* term at *Guildhall*, but will endeavour to forget what passed at the trial, (where it appeared to be a most frivolous action) because the question must be determined on the record, and not on any particular report of mine.

The words of the stat. 21 Jac. 1. c. 15. §. 6. are very strong, that in all actions on the case for slanderous words there shall be no more costs than damages, if the verdict be for less than 40s. And if it were a new case, I should

not be of opinion to take many of those cases (which have been so determined to be) out of the statute. And I am now against going a jot farther than the authorities will warrant, and think it best to adhere to some certain rule. The case of *Topsall and Edwards*, *Cro. Car.* 163., was not only for words, but likewise for procuring the plaintiff to be indicted and imprisoned for felony. The case of *Blizard v. Burns*, *Cro. Car.* 307., was for words and likewise for procuring the plaintiff to be arrested for felony and imprisoned for three days. The case of *Fish* and *Philips* in *B. R.* 11 Geo. 1. was for words and also for carrying

Barnes 132.
S. C.

(a) The case was argued by Skinner King's Serjeant in support of the rule and by Prime King's Serjeant on the other side on the 23rd of November 1743.

trying the plaintiff before a justice of the peace and detaining him. It is certain that actions of slander of title will not lie unless special damages be alleged and proved; and for this reason it has been holden that they are not within the statute; and therefore the plaintiff shall have all costs though the damages found be under 40s., as was holden in *Cro. Car.* 140, 1; and 1 *Jen.* 196. But none of these cases are at all parallel to the present. But in the case of *Burrow v. Perry*, which was a case very like the present, and which was solemnly argued and thoroughly considered, *Tr. 5 & 6 Geo. 2. B. R. 2 Lord Raym.* 1588. it was holden that, where the words were in themselves actionable, being laid to be spoken of a man in the way of his trade (as in the present case) though special damages were laid, the damages given by the jury being under 40s., the plaintiff should have no more costs than damages; and the Court founded this their opinion on the case of *Brown v. Gibbons*, 1 *Salk.* 206., and many other cases; and they laid down this rule that when the words are actionable, though special damages are laid, it will not alter the case; but when the words are not actionable, and special damages are laid, it is not a case within the statute, because properly speaking the action is not for words but for the special damages. And I am willing to abide by this rule and this distinction, but not to go a jot farther. For where the damages are laid only by way of aggravation, a verdict must be for the plaintiff, if the words be proved though the damages be not; but where they are the gist of the action, if the damages be not proved, the verdict must be for the defendant; and there can be no such thing in either case as a verdict for the plaintiff as to the words and for the defendant as to the special damages. In the case cited for that purpose out of 1 *Ventr.* 53; 1 *led.* 31; and 2 *Keb.* 589; there was a special verdict and for the opinion of the Court whether the words were actionable of themselves. The case of *Denny v. Egge* (b) in this court *M. 10 Geo. 2.* is a case of but very little authority, as there were but two Judges in court, as it was very little considered, and as it is directly contrary to the case of *Burrow and Parry* which was solemnly considered and determined. As to the case *Lazenby v. Cooke* (c), I shall say no more of it but that it was not considered at all; that I was borne down by the

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(a) 1 *Str.* 936. *S. C.* (b) *Pract. Reg.* 111; and *Sir G. Co.* 137.
(c) *M. 13 Geo. 2. C. B.*

1743. the authority of *Denny* and *Wigg*, and that I did not con-
cur in that resolution.

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And in the present case I shall say no more but that for the reasons already given we think there ought to be no more costs than damages. Therefore for the future it is to be the settled rule of this Court that where the words themselves are actionable, and the damages are laid only by way of aggravation, if the verdict be under 40s. there are to be no more costs than damages (a). But if the words be not actionable and the special damages are laid, in which case they are the very gist of the action and the plaintiff cannot recover without proving them, if the verdict be for the plaintiff, though the damages are under 40s., the plaintiff shall have full costs."

— "N. Mr. J. *Fortescue A.* was not in court either at the time of the argument or giving this judgment but having heard of our opinion has declared that he differs from us, and that he adheres to the opinion which he gave in the case of *Denny* and *Wigg*."

(a) *Tiffin v. Gize*, *Barnes* 142; *Surnam v. Skelton*, 3 *Burr.* 1688; and *Collier v. Callard*, 2 *Bl. Rep.* 1062. S. P. But if some of the counts in the declaration be for words that are actionable, and others for words not actionable, and special damage be laid referring to all the counts, and a general verdict for the plaintiff, he is entitled to full costs, though he recover less than 40s. damages. *Saville v. Jardine*, 2 *H. Bl. Rep.* 531.

H 17 G. 2. The Mayor and Commonalty of the Borough of
Monday, PLYMOUTH against WERRING.
Feb. 13th.

Where a penalty is given by a statute (even subsequent to the statute of Gloucester) to the party grieved, he is entitled to costs if he succeed: and if he nonsuit, or a verdict pass against him, he is liable to pay costs to the defendant either under the 23 H. 8. c. 15. or 4 Jac. 1. c. 3. which gives costs to the defendant in all cases where the plaintiff is entitled to costs if he succeed.

—The stat. 18 Eliz. c. 5. s. 3. which gives costs to defendants in popular actions if the plaintiff be nonsuit, extends to subsequent as well as prior statutes.

of 20*l.* upon any one that shall at any time there- 1743, 4.
obstruct or disturb them, to be paid as aforesaid. *The Mayor*
plaintiffs declare that they finished the said trench &c., &c. of PLY-
made reparation from time to time &c., but that the MOUTH
on 2d September 1742 broke and destroyed the banks *against*
said watercourse, and obstructed hindered and di- WERRING.
the course of the said river and water from its
to the town of *Plymouth*, contrary to the statute,
by an action accrued to them &c. to demand the
1*l.* &c.

defendant pleaded nil debet; and the plaintiffs
onsuit at the assizes held for the county of *Deron*.

otion (a) had been made for the defendant for costs,
rule nisi had been obtained, and *Belfield* had been
against it. And now the Court gave judgment that
endant was entitled to his costs.

were of opinion that common informers, if nonsuited,
to pay costs by the stat. of the 18 *Eliz c 5. f. 3.*
e thought that that extended as well to informations
it upon penal statutes made afterwards b) as those
were in force at that time. But this case is ex-
out of that statute by the proviso sect. 6. which is
e words; "provided always that this act shall not
to any person or body politic to whom or to whose
h penalty forfeiture or suit is or shall be specially
by any statute."

this case therefore is not within this statute, the
question in the present case was whether the plaintiffs
have been entitled to costs in case they had re-
d a verdict against the defendant; because if they
we were of opinion that the defendant in this case
entitled to costs, either by the 23 *H. 8. c 15 f. 1.* or
4 *Jac. 1. c. 3.* entitled "an act to give costs to
defendant on a nonsuit of the plaintiff or a verdi
him." The words of the statute are that the de-
it or defendants shall have costs in several actions
ng them,) and in any other action whatsoever wherein
intiff might have costs in case judgment should be given
n, if the plaintiff or plaintiffs be nonsuited or a verdict
pals

It appears that this motion was made by Mr. Serjt. *Wynne*; and
was argued on Saturday the 4th of February.
This was so determined in *Williams q. t. v. Drew*; sup 392. See
cases there referred to in note.

1743, 4. pass against him or them in such action. And we we
 opinion that the plaintiffs would clearly have been
 The Mayor &c of PLY-
 MOUTH
 against
 WERRING
 1743, 4. pass against him or them in such action. And we we
 opinion that the plaintiffs would clearly have been
 entitled to costs, if they had recovered in this suit, by
 statute of *Gloucester*, 6 Ed. 1., and the construction w
 has been all along put upon it. Lord Coke 2 Inst.
 says that this statute doth extend to give costs in all
 where damages are given to any demandant in a plaint
 any action by any statute made after that parliament.
 10 Co. 116. it is said that in all cases where a ma
 covers damages, he shall have costs (a). In *Cro. Car.*
North v. Wingate, it is holden that when a certain st
 given by a statute to the party grieved, he shall rec
 costs, otherwise he would be a loser by expending m
 than he recovered, which the statute could never int
 In 1 Lutw. 201. it is said that when a certain su
 given to the party grieved, there he shall recover
 and damages. The case of *Eaton v. Barker*, 1 Vent.
 23 Car. 2. B. R. was thus; an action popular
 brought on the 17 Car. 2. for residing in a place w
 the defendant had formerly kept a conventicle; ver
 for the plaintiff, who afterwards moved that he m
 have his costs: but the Court held that they ought n
 be given in actions popular, whether the forfeiture
 certain or not: but where a certain penalty is gi
 to the party grieved, he shall have both costs and
 mages. In the case of *The Corporation of Cutlers*
Ruslin, M. 5 W. & M. B. R. Skinner 363. it was hol
 that the plaintiffs should have their costs, the action be
 brought by the parties grieved. And in a case determi
 the very same term upon this very act of parliament
 tween the *Corporation of Plymouth* and *Collins*, reported
Cartbaw 230, it was adjudged per totam Curiam that
 plaintiffs should have their costs, because the penalty
 given to the persons grieved; and the case of *The Cor*
poration of Cutlers v. Ruslin, determined in the same ter
 was cited as an authority in that case.

As therefore the plaintiffs would have been entitled
 costs, of consequence the defendant is entitled to costs
 the present case. The only case that was cited to t
 contra

(a) In the original this general proposition is qualified thus: "whi
 is meant of all cases where he should recover damages either before t
 said act of the 6 Ed. 1. or by the said act." But that is not only contrar
 to the doctrine laid down by Lord Coke himself in 2 Inst. 289, but it h
 since been contradicted in 2 Wils. 92; and 1 D. & E. 72.

Contrary was out of *Hutton* 22: but in that case it was 1743, 4-ly determined that it was not a case within the 23 H. 8., because it was a suit on a subsequent statute, viz. 5th Eliz.; nor within the 4 Jac. 1., because an action where the plaintiff was not at all damnified, so not at all parallel to the present case.

The Mayor
&c. of PLY-
MOUTH
against
WERRING.

So we made the rule absolute for costs (a)."

(a) See also 1 *Ld. Raym.* 172; *Greatbam v. The Inhabitants of the Hundred of Theale*, 3 *Burr.* 1723; *Wilham v. Hill*, 2 *Wils.* 92; *Wilkinson v. Allot*, *Comw.* 366; *Jackson v. The Inhabitants of Calesworth*, 1 *D. & J.* 71; *Woodgate v. Knatchbull*, 2 *D. & E.* 154; *Creswell v. Hoghton*, 6 *D. & E.* 355; *Tyte v. Glode*, 7 *D. & E.* 267; and *Ward v. Snell*, 1 *H. L. Rep.* 10 — It has also been ruled that an action given by statute to a party grieved is not within the Stat. 31 Eliz. c. 5. which limits the bringing of actions on penal statutes. *Callisford v. Blunsford*, 1 *Show.* 353; *Spieris v. Frederick*, T. 25 G. 3. B. R.

LLOYD against MORRIS.

E. 17 G. 2.
Friday,
April 13th.

HAYWARD moved in arrest of judgment. It was an action for words; and the jury found for the plaintiff, damages two guineas. There was but one count; and the words were "you are a pickpocket and murderer; you stole a guinea from A; you killed his wife, and murdered his child." He insisted that the verdict being general, and some of the words viz. "killed his wife, and murdered his child," not actionable, the judgment ought to be arrested; and he compared it to the case of two counts, in one of which the words are actionable and in the other not. He cited the case of *How v. Prinn*, 2 *Salk.* 694, which is nothing to the purpose; and the case of *Lloyd v. Morfe*, *Cro. Jac.* 424. which was thus; action for these words "thou art a bankrupt rogue and accounted a common knave; thou art a thief, and hast stolen my corn:" the first words "thou art a bankrupt rogue and accounted a common knave" the defendant pleaded not guilty; and justified the other words. Verdict for the plaintiff on both issues, i.e. damages for the first words, £39s. for the second, and costs for both; and judgment reversed, because the first words were not actionable, plaintiff being neither merchant nor tradesman, and judgment being entire; for in the judgment the damages were joined though they were severed in the verdict.

The Court
will not ar-
rest the
judgment
in an action
for words
in one
count,
though
some of
them be not
actionable
—Secus,
where
there are
two counts
and none of
the words
in one are
actionable,
and a gene-
ral verdict
for the
plaintiff.

He

1744. He cited also the case of *Graves v. Blanchett*, 6 Mod
 where there were two counts in an action for words
 a general verdict and entire damages, and judgment
 arrested.

LLOYD
 against
 MORRIS.

We had none of us much doubt, because this
 very different from the case of two counts, where
 defendant might have been found not guilty upon
 guilty upon the other, and the case where the was
 severed by the plea, for the same reason. But
 case it was necessary either to find the defendant
 the whole or none; and if judgment must be
 man by speaking words not actionable and
 tionable together will secure himself from an
 cause he must be found guilty of the whole or none.

My Brother Abney indeed thought that if the
 words which are laid in a count are not proved
 those which are actionable be proved it is sufficient.

But I and my Brother Burnett thought otherwise.

In this case *We were all of opinion* that the
 could not be found otherwise; and we would take
 the jury only gave damages for such part of the
 were actionable, and that the Judge directed the
 do. However we made a rule nisi in order to
 the cases, but declared that our present opinion
 that the plaintiff was entitled to his judgment
 afterwards he moved, and had leave to enter
 judgment."

E. 17 G. 2. JOSEPH MARTIN on the Demise of THOMAS
 Tuesday, GONWELL against JOHN STRACHAN and
 17th April. HARRISON. In Error.

Dom Proc. THIS was an ejectment brought to recover
 If tenant in tail of lands Dorsetshire, and on a trial at bar in the C
 by purchase King's Bench in Michaelmas term 1738 the jury
 under a settlement special verdict, in substance as follows.
 made by an ancestor ex parte maternâ, with the reversion in fee by descent ex parte maternâ
 a common recovery to the use of himself and his heirs, the lands will descend
 heirs ex parte paternâ.

The lands in question were formerly the inheritance of *John Tregonwell* Esq., the great great grandfather of *Thomas Tregonwell* the lessor of the plaintiff; and he died seised thereof in the year 1639, leaving two sons *John* and *Thomas*. *John* the son had issue *John* the grandson, who after his father's death entered and was seised in fee of the lands &c; and had issue two daughters, *Mary* and *Catherine*. That *John* by a settlement, dated the 3d of June 1680 made upon the marriage of *Mary* his eldest daughter with *Francis Luttrell*, settled great part of his estate (after some limitations in part to the use of himself and *Jane* his wife as a provision for themselves for life) to the use of *F. Luttrell* for life, remainder to *Mary* for life, remainder to the first and other sons of that marriage in tail male; remainder to her first and other sons by any second or other husband in tail male; remainder to his second daughter *Catherine* for life, with like remainders to her first and other sons in tail male; remainder to the daughters of *Mary* in tail; remainder to the daughters of *Catherine* in tail; and for default of such issue he limited the reversion in fee to his own right heirs. The other part of the estate he settled by the same deed in like manner on his daughter *Catherine* for life, remainder to her first and other sons in tail &c.; remainder to his eldest daughter *Mary* for life, remainder to her first and every other sons in tail &c; with the like remainders to the daughters of *Catherine*, and then to the daughters of *Mary* in tail; and for default of such issue he limited the reversion in fee to his own right heir. *John Tregonwell*, the father of *Mary* and *Catherine*, died on the 29th of January 1680, having survived his wife; whereupon *Francis Luttrell* and *Mary* his wife in right of *Mary* entered into that part of the estate which was limited to *Mary* and her issue; and upon the decease of *Catherine* who died on the 11th of August 1683 under age and unmarried they entered upon the estate settled on *Catherine*; and then the reversion of the whole estate (of which during the life of *Catherine* *Mary* was only a coheir with *Catherine*) descended to *Mary* as right heir of her father. *Francis Luttrell* died in August 1690, leaving issue only two daughters *Mary* and *Frances*; and having had a son who died an infant. *Mary* the eldest daughter married Sir *George Rock* in the year 1700, and afterwards they both died, leaving issue *George Rock* heir only son. *Frances* the younger daughter in 1705 married *Edward Ash* and is now living. *Mary* the widow

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1744. of Francis Luttrell on the 1st of January 1701 married Sir Jacob Bancks, and had issue by him two sons John and Jacob, and in 1703 died seised. On her death John Banks the eldest son entered and was seised, and in 1725 he died without issue; whereupon Jacob his only brother entered and was seised according to the settlement &c; and being so seised in Michaelmas term 1725 he suffered a common recovery and declared the uses to himself in fee, and afterwards in February 1737 he died seised without issue. The lessor of the plaintiff was great grandson and heir to Thomas Tregonwell (who was the second son of the first John Tregonwell) and likewise heir ex parte maternâ to the said Jacob Bancks. The defendant Strachan was heir to the said Jacob Bancks ex parte paternâ.

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Upon this special verdict the Court of King's Bench (a) gave judgment for the defendants, upon which a writ of error was brought in the House of Lords (b).

After this case had been argued at the bar of the House of Lords, the following question was proposed to the Judges for their opinion,

Whether upon the death of Jacob Bancks the estate in question descended to his heir on the part of the mother or not?

The opinion of the Judges was now delivered, as follows, by

Willes, Lord Chief Justice, B. C. "Though this is a very short question, it is a question of very great importance, as the determination of it one way or other may affect a great many families in this kingdom, and I do not know that it has ever been yet judicially determined. Though therefore we are all agreed, your Lordships will (I presume) expect in a case of such great consequence that I should not only give you our opinion, but likewise the reasons on which it is founded.

In order to determine this question it will be necessary to consider two things,

1st, What estate Jacob Bancks had at the time when he suffered the recovery?

2dly, What estate he gained by suffering this recovery, or in other words what was the operation of this recovery?

At

(a) Vid. 2 Str. 1179: but more fully stated in 5 D. & E. 101.2.

(b) The report of this case in 1 Wils. 66, though very confused, appears to be an account of what passed in the House of Lords.

At the time of suffering this recovery *Jacob Bancks* was seized of an estate-tail, with a remainder to *G. Rook* and *Frances Asb* in tail, and the reversion to himself in fee; and this by virtue of the settlement made by *John Tregonwell* on the 3d of June 1680 on the marriage of his eldest daughter with *Francis Luttrell*, he having two daughters and no son. By that settlement the premises in question were settled on *John Tregonwell* the grantor for life, then to the use of *Francis Luttrell* for life, remainder to *Mary* his daughter for life, remainder to her first and every other sons by *Francis Luttrell* in tail male; remainder to her first and every other sons by any other husband in tail male; remainder to her daughters by *Francis Luttrell* in tail general, remainder to her daughters by any other husband in tail general; remainder to the heirs of the grantor. I omit all the other limitations, because they were all at an end before the recovery was suffered, and therefore are quite immaterial. *Mary* by *Francis Luttrell* had a son, who died an infant, and two daughters *Mary* and *Frances*. *G. Rook* is the son of *Mary* the daughter; and *Frances* the other daughter married *E. Asb*; and they were both living at the time of the recovery, and *Frances Asb* is found by the special verdict to be still living. *Jacob Bancks*, who suffered the recovery, was the son and heir of the said *Mary* the daughter of *John Tregonwell* by her second husband Sir *Jacob Bancks*. So it is plain that at the time of the recovery he was seized of the estate tail by purchase under the settlement, and of a reversion in fee by descent as heir to his mother who was the daughter of the grantor.

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As I say that he was seized of an estate-tail by purchase, I will be proper to explain to your lordships what is the signification of the word "purchase" in a legal sense; though in common parlance no one is said to be a purchaser unless he buy an estate, the sense which the law puts upon the word is quite otherwise; and it is made use of in contradistinction to "descent;" and in this sense by one is said to take by purchase who does not take by descent. If therefore a man make a voluntary grant to her, or devise an estate to another, or model his own estate so by a conveyance that he gives himself a new use, the grantee, devisee, and the person who has acquired such a new estate, are all said to take by purchase.

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No man by law is said to take by descent unless he claim as heir to a person in whom the inheritance was vested; for a man may claim as heir to another, and yet take by purchase. As for example; if a man grant an estate to *A.* for life, with remainder to the heirs of *B.*, to whom he grants nothing, the heirs of *B.* in that case will take by purchase, and not by descent, because *B.* had no estate in him; and in common sense as well as at law it cannot be said that any thing descends to an heir from one who had nothing in it himself. Now the rule of law that an estate shall go to the heir on the part of the mother holds only in such cases where the land descends to one from his mother; for if he take by purchase, it shall always go in the first place to his heirs on the part of the father, they being considered as the most worthy.

From what I have said it appears plainly that *Jacob Bancks*, who claimed as the son of his mother under the settlement, (which is a name of purchase) and not as heir of his mother, took the estate tail by purchase and not by descent. If indeed the estate had been limited by settlement to the heirs of the body of *Mary*, it had been otherwise; and in that case *Jacob* had had the estate tail by descent from his mother, and then there would have been an end of the question, as he would have had both his estates by descent. The case likewise would have been as plain on the other side, if the estate had not been limited to *John* the grantor for life; for if not, though *Jacob Bancks* had claimed the reversion as his heir, he would have had that likewise by purchase. But his having an estate-tail by purchase and the reversion in fee by descent is what creates the dispute. I have said (I think) enough upon this first point, considering that the counsel did not differ as to this; and I should not have said so much, but that setting this matter in a clear light will contribute very much towards the explanation of the second point, concerning which the dispute principally arises.

In order to determine the second point concerning the operation of this recovery, it will be proper in the first place to consider a little the nature of these common recoveries; and I shall consider them only as common assurances

ances and not at all as real transactions, being of opi-
 nion that all the confusion which has arisen concerning
 recoveries has been occasioned by resembling a com-
 mon recovery to another recovery, by considering it as a
 transaction, and by endeavouring to give the reasons
 for its operating in the manner that it now does. The
 learned men that we have had have split upon this
 ; for they never could have said so many absurd things,
 they not endeavouring to explain a thing in its nature
 applicable. I beg leave to mention some of them in
 order to lay them out of the way, both because they were
 mentioned at the bar, and likewise as a reason for my con-
 sidering common recoveries quite in another light.

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Then this method of common recoveries was first in-
 vented, a plausible reason was given for them, (for it was
 necessary at first to give some reason) that no injury was
 done either to the heir in tail or the remainder-man, be-
 cause they would both have satisfaction out of the estate
 which was recovered by the vouchee, according to what
 is said in *Co. Lit.* (which is undoubtedly law) that if a
 man lose his land and recover other land in value against
 his vouchee, it shall go to the same uses as the land which
 he lost, for the recompence shall follow the loss. But it
 was soon found that this notion would not do, for many
 persons were to be barred by common recoveries that
 could have no advantage of the recompence, and there-
 fore it was soon holden that the recompence in value was
 not the reason of barring the issue in tail but not the rea-
 son of barring those in remainder. And as this recom-
 pence in value is but mere fiction, (for in truth there is
 no recompence at all,) and as these common recoveries are
 now become the common assurances of the nation, and
 upon every man's estate in the kingdom now depends
 the validity of them, the judges in modern times
 have frequently ventured to go further and say (as is ex-
 pressly said in the case of *Hudson and Benson* (a) which I
 mention more particularly by and by) that the reason
 for the operation of common recoveries is not the recom-
 pence in value, but because they are common assurances.
 When it was found necessary to say so by reason of an an-
 cient case 2 *Roll. Abr.* 394. (b), where tenant in tail levied
 his land with proclamations, and afterwards suffered a com-
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a *Lev.* 38; and 1 *Mod.* 108.

(b) 2 *Roll. Abr.* (B), pl. 1.

1744. mon recovery, and it was holden that it barred the remainders, and yet in that case and many others which have since happened the issue in tail could have no recompence because the estate-tail was destroyed by the fine before recovery suffered.

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As this notion of a recompence would not do, in others have been invented. By some it has been said (as was said at the bar in this case) that this is a privilege annexed to an estate-tail; to prove which it has been gone as far back as before the statute de donis^(a), shew that these estates before the statute were conditionally alienable as soon as the party had issue; but to think this a very absurd notion. For as the statute plainly made to make estates-tail absolutely unalienable, is a strange construction on this statute to say that a power to alien by a common recovery was a privilege annexed to an estate which was intended by that statute to be absolutely unalienable.

Others have said (and so likewise it was said by the counsel here) that a common recovery was an exception out of the statute; a notion as ill founded as the other. For the statute expressly recites the mischief which it was intended to remedy, which was, that the will of the donor had not been observed, but that after issue born the tenant in tail had aliened expressly against the will of the donor and therefore it enacts that the will of the donor for the future shall be observed, and that the tenant in tail shall have the power of aliening. There is no exception mentioned in the statute, and to imply one is to repeal the statute, and to overturn the whole intent and purpose of it.

Others have said that the fee gained by the recovery is but a continuance, enlargement, or extension, of the estate-tail. Now considering it as a common conveyance there is plainly nothing at all in that; for the estate, being conveyed away, cannot be said to be continued, enlarged, or extended. And considering it as a real transaction, it is still worse; for if it be a real transaction, the estate-tail is adjudged to be void ab initio, as made by one who had no title. And what can be more absurd than to say that an estate which is adjudged to have been void ab initio,

(a) Westm. 2. c. 13 Ed. I. B. 1. c. 1.

intended or enlarged by such judgment. And upon this reason I cannot help taking notice of two passages in Mr. Pigot's *Book of Recoveries*; one in page 18, and another page 21. In page 18 he says that there is a difference between a fine and a common recovery; "for a fine proves right in him who levies it, but a common recovery disallows and disaffirms all right and title in him against whom it is had;" for it is founded on a supposition that he who made the entail had no title; and yet in page 21 he says (which is most true) that he who comes in under a common recovery is subject to all the charges of tenant in tail, which, if his former position were true, is irreconcilable with reason and justice. I do not mention this to reflect on Mr. Pigot, for he was certainly a very learned man in this part of the law, and a very good conveyancer. But I mention it only to shew that when the greatest men endeavour to maintain points which are not maintainable, and to give reasons for things which are not founded in reason, they are necessarily forced to talk inconsistently. And Mr. Pigot has himself admitted this in page 37 of the same book, where he says very truly of these recoveries (and I cannot express myself in better words) that the reasons given for the operation of recoveries favour of a wonderful subtilty, and are but apices juris, and if now agitated in court would not be easily admitted: but courts of law now use this method to support them, as they are now the common conveyances of estates. And Lord Coke very truly says to the same purpose in *Dormer's case* 5 Co. 40. that a common recovery is not to be resembled to a recovery by any other real action, but it is by consent and in nature a common conveyance or assurance of lands.

I hope I have said enough to justify me in not considering a common recovery at all as a real transaction; and in the definition which I am going to give of it and to which I shall adhere I shall not regard it at all as such; *That a common recovery is a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee-simple.* This definition will, I think, comply with all the resolutions that have been made concerning common recoveries, and will solve most of the difficulties that have been raised.

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But

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1744. But to explain this a little further—I beg your Lordship's patience a moment longer, to give you an account of the true origin and nature of these discoveries. As I said before, entails by the statute de Donis (made 13 E. 1.) were made unalienable, and neither the issue nor the remainder-men could be barred, and this was at first considered as a very wise provision, and great encomiums were made upon this statute. But it was found by experience in a very little time that this statute had produced very great inconveniences; inconveniences to the crown, inconveniences to the public, and to many private persons;

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To the crown, as it prevented forfeitures, and greatly increased the power of the barons;

To the public, as it was prejudicial to trade and commerce to have estates always continue in the same families, without even a power of raising money upon them;

And to private persons, to have their estates so fettered that they could not make provision for younger children, nor raise money on their estates, though their necessities were never so great.

For these reasons not long after the statute, and as it has been said as early as the time of *Edw. 3.*, men were looking about to see how to evade or at least to enervate this statute. But though some will have it that common recoveries were invented in his reign, there does not seem to be any solemn determination in their favour till the 12 *Edw. 4.*; when *Edward the Fourth* a wise prince, being sensible of the inconveniences arising from this statute, resolved if possible to break through it. To repeal it absolutely was impracticable, it was so much a favorite of those times; and to endeavour to alter it by parliament might be attended with ill consequences; he thought it therefore most advisable to proceed in a judicial way, and accordingly brought on (as it is said) *Taltarum's case* before the Judges, that the authority of these common recoveries might receive a judicial determination; and the Judges, who in all ages have set their faces against perpetuities as destructive of the welfare of the nation, were easily brought to concur in such a judgment as was desired. At first, as I have said already, these recoveries

were

(a) 12 Ed. 4. 14 15 19; *Hendr.* 209.

endeavoured to be supported by legal reasons, but in 1744-
 of time they gained strength and authority by their
 dience, and at length being taken notice of and in
 degree confirmed by several acts of parliament they
 up into what they now are, and having been in use
 many hundred years and having become the com-
 assurances of the nation, their authority cannot be
 called in question, without overturning most of the
 in the kingdom.

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is ridiculous therefore to give any legal reasons (a)
 them, since they subsist now upon usage and ex-
 pectation, and as such only I shall consider them, and shall
 directly to the point in question; which is the open-
 ing of this recovery.

great many cases were cited on both sides, but none
 came in point: and I think there were but six at all
 material to be considered in the present case: three of
 which were cited on the part of the plaintiff, two on the
 part of the defendant, the other was insisted on as an au-
 thority by both.

The first case insisted on by the plaintiff was the case
Abbold v. Freestone, 3 Lev. 406. A man seised in
 lands descended to him from his mother makes a
 bequest to the use of himself for life, remainder to the
 issue of his body, remainder to his right heirs; and held
 the remainder should go to his heirs ex parte maternâ,
 as it was part of the ancient use: but this case differs
 from the present in two very material circumstances; first,
 the conveyance was by feoffment (b), which has a very dis-
 tinction from a recovery: but the most material differ-
 ence is that he who made the feoffment had an estate
 in descent from his mother, so he had no other estate
 but what came from his mother. The next case
 for the plaintiff was the case of *Abbot and Burton*,
 1559; *Comyns*, 160 (c). A man seised in fee of
 lands

Id. 1 Bl. Rep. 254.

If A, being seised in fee by descent ex parte maternâ, enfeoff B,
 and B re-enfeoff A. and his heirs, the line of descent is broken,
 and heirs ex parte paternâ will take. *Co. Lit.* 12. b; *Price v. Langford*,
 93; *Salt.* 337; and *Carth.* 141.—So if A., seised in fee of co-
 lands, of inheritance by descent ex parte maternâ, surrender to B.
 (a mortgagee) who on the payment of principal and interest sur-
 renders again to A. and his heirs, the estate will descend to A.'s paternâ.
Doe d. Herman & Wife v. Morgan, 7 D. & B. 103.
12 Mod. 181. b. C.

1744. lands descended to him on the part of his mother suffered a recovery and declared the uses to himself for life, then to several other persons in tail, with the last remainder to his own-right heirs; and it was holden that the last remainder would go to his heirs on the part of the mother, which was the ancient use. This indeed is the case; but it differs likewise from the present in the most material circumstance. For there the whole estate came to the person who suffered the recovery by descent from his mother, whereas in the present case nothing can to *Jacob Bancks* as heir to his mother, but a reversion of an estate-tail, which is in law considered of little or no value, as it can be barred by the tenant in tail whenever it pleases. Nothing therefore was determined in that case which was in any wise material to the present, only that whether the use is declared to a man by express words or whether it results by implication; for *expressio eorum quæ tacite insunt nihil operatur*. I mention this because it is now undoubtedly law (a), though it was formerly held otherwise, as appears from the case of *Caunden v. Clerke*, *Hob.* 31. The third case insisted on by the plaintiff was the case of *Symonds and Cudmore*, *Cartbaw* 25; and 1 *Salk.* 338. Tenant in tail, with reversion to himself in fee, made a lease for 99 years, and a fine was levied by his issue; and it was holden that it did not bar the term, because it issued out of the reversion in fee, as well as the estate-tail. This was strongly insisted on as an authority for the plaintiff; but we think it none because the conveyance there was by fine, which, if the grantor had been only tenant in tail, would have conveyed only a base fee determinable on his want of issue, and then the reversion would have taken place; and therefore to give the donee a complete estate in fee simple, it was necessary that an interest should pass out of the reversion; and as he took an absolute estate in fee by the fine as a grant of the reversion, the base fee was merged in that: and as the fee therefore in that case arose out of the reversion, it was but reasonable that it should be charged with the grant of him from whom the reversionary interest came. But in the present case the recovery by the tenant in tail passes an absolute fee, and no interest passes to the recoveror out of the reversion in fee, (as I shall shew more fully by and by); so there is a manifest difference between these two cases. But I presume upon the authority

(a) See also *Harris v. The Bishop of Lincoln*, 2 P. Wms. 138.

of this case it was said by the counsel for the plaintiff 1744.
 in the case of a fine (b) by tenant in tail with remain-
 to himself in fee, if he declare the uses to himself and
 heirs, it shall go to the same heirs as he was seised of
 reversion before. But there was no case cited to sup-
 port this assertion; and when the case exists I shall doubt
 much whether the law be so or not. But if that were
 from what I have already said in relation to the case of
Winds and *Cudmore* it would be no authority in the pre-
 sent case, because there is a great difference between the
 nature of a fine and a recovery. These were the only
 material cases which were mentioned on the part of the
 plaintiff.

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The first which was cited on the part of the defendant
 in *Capel's case*, 1 Co. 61. There a tenant in tail, with
 remainder to B. in tail, with several remainders over, suf-
 fered a common recovery; and held that it barred a rent-
 charge granted by B. the remainder-man in tail; and
 on this plain reason, because it barred the estate out of
 which the rent-charge was granted. So the point there
 in question had no relation to the present, but what was
 chiefly insisted on from the authority of this case, was
 that it is said at the latter end of it, that a recovery not
 only barred the charges of him in the remainder in tail
 but likewise of him in the reversion for the same rea-
 son. But as the tenant in tail in that case had not the
 reversion in fee in himself, these words though said gene-
 rally must be construed secundum subjectam materiam;
 for as it does not appear that the Judges there had this
 in view at all in contemplation, it is a strained construction
 to apply it to the present case, where the reversion in fee
 was in the person who suffered the recovery.

It was asked indeed by the counsel for the defendants,
 what is the difference between the two cases, when the
 reversion in fee is in another, and when it is in the tenant
 in tail? and though this question was repeated several times
 by the counsel for the defendants. I do not remember
 that the counsel for the plaintiff gave it any answer. But
 I think there are two plain differences. As first, in the
 first case, there is no ancient use in the tenant in tail on the
 part of the mother; secondly, the reversion is certainly
 vested in the one case, in the other it certainly is not,
 for

(*) Vid. 5 D. & E. 108, 9.

others, remainder to his own right heiss; and that if there should be a failure of issue male another person should have a rent-charge of for ten years out of the rents and profits of the issue male after his death suffered a common law held that it barred the rent-charge, because estates chargeable with it; and this general law to imply that the reversion in fee which was suffering the recovery was barred: but it is only said so; and therefore though the expression the reversion in fee does not seem to have been at all in this case. It does not therefore weigh much in the determination of the present case with some of my Brothers. The case of *Le water* (a) which was appealed to on both sides as an authority for neither, but quite immaterial in the present case; for all that was determined in it was that the word *purchase* in the statute 11 a. 1 (which was a very penal law) ought not to be taken in its most extensive sense, but in the sense commonly understood, as where a man buys of another. I have taken notice of all these cases as they were cited at the bar, rather to lay the blame away than to lay any great stress upon them in the present case, which I think may be determined upon without the aid of any of those authorities.

I shall now mention very briefly what arguments which induce us to be of opinion that the estate

If no such use as is insisted on by the plaintiff were
 ling at the time of the recovery suffered, all the ar-
 guments for the plaintiff fall to the ground at once; and
 ink that there plainly was not. The use that then ex-
 ist was only a reversionary use, which if the recovery
 not been suffered could never have come in possession
 there was a default of issue both in the tenant in tail
 the remainder-men. But the use which is now con-
 sidered for by the plaintiff is an use to take place in pos-
 session immediately before there is a default of issue of
 remainder-men; for *Francis Ape* is found to be still
 living; and it is therefore a new and quite different use
 than that which existed at the time of the recovery; and
 is so plain, that I need go no further.

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But as the other reason was chiefly relied on by the
 counsel for the defendants, I will say a little likewise as
 to that. In what manner this recovery operated on the
 reversion in fee may admit of some doubt. It was insisted
 that the recovery barred it; but I cannot think that it did,
 for a man cannot be properly said to bar his own estate.
 Whether it barred destroyed or conveyed it, I think it
 amounts to just the same thing. For either it remained
 in the recoveree after the recovery suffered, or was de-
 stroyed by it, or was conveyed to the recoveror; and in
 every case the consequence will be just the same. If it
 was destroyed, the use must be destroyed likewise. If it
 was conveyed to the recoveror, he took nothing by such
 conveyance, because he had a fee-simple without it by
 the recovery suffered by the tenant in tail; and there can-
 not be a fee upon a fee. If it remained in the recoveree,
 it was annihilated immediately for the same reason;
 for if he as tenant in tail having conveyed a fee to the
 recoveror, for the reasons just before mentioned, it must
 be annihilated, because there cannot be two fees in two
 persons at the same time. For my own part, I choose
 rather to consider it as a conveyance of the reversion, and
 think that it must operate as two grants; and then *Jacob*
Wells having granted a fee as tenant in tail (as he certainly
 did) to the recoveror, the grant of the reversion comes
 late, because he had a fee before, and that the same
 may operate as two made at different times to pre-
 vent inconsistencies. I shall mention one case out of *Co.*

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recovery operates, it is plain from what I
the new use arises entirely out of the estate
at all out of the reversion in fee.

Many things were said by the counsel of
and inconveniences arising in this case ; of
by the counsel for the plaintiff; and of the i
by the counsel for the defendants. As for
they have no weight with me for two plain :
because your Lordships, when sitting in jud
writ of error, must have no regard to the
case, but must determine according to law
a hardship in the Law, the Legislature must
but a Court of Law must judge as the Law
Secondly, The opinion we are now of in th
will be attended with no hardship at all.
complained of is, that the estate which c
mother will go to persons who are quite stran
Now if it go to the plaintiff, it will go to
is not heir to the mother, which is equa
Frances Ash her daughter who is still living
law, and must have taken as such if the mo
last seized. But as the rule of law is tha
claim from the person who was last seized, a
was only of the half-blood to *Jacob Bancks*,
whole blood to her mother, she cannot by la
to *Jacob*. So be your Lordships' determin
or the other, the hardship will be the same,
of the blood of the mother will be disunb

this inconvenience may be prevented for the future man's declaring the uses to the heirs on the part of father, and by many other methods, yet how this affect recoveries which have been already suffered, how many persons may be in the same circumstances, very difficult to say. The only doubt which I have relation to this matter is this (for otherwise I entirely agree with my Brothers) whether we being now upon a final verdict can take notice of any facts which are not particularly found; for if Judges were at liberty to suppose inconveniences which do not appear in the special issue, and which may or may not exist, I am afraid that judgments would sometimes be given upon too slight pretexts, and every judge would be left too much to his own private conjectures. However I submit this to the Lordships, but think that the case may be determined without having recourse to this argument.

1744.

MARTIN
dem. TRE-
GONWELL
against
STRACHAN;
in Error.

as what I rely upon is that the use, under which the plaintiff would entitle himself, is not the ancient use, which descended to *Jacob Bancks* as heir on the part of the mother, both because no such use existed at the time of the recovery, and also because the use which was declared was entirely out of the estate tail.

For these reasons we are of opinion that the estate in question upon the death of *Jacob Bancks* did not by law descend to his heir on the part of the mother (a)."

And the judgment was affirmed.

See *Roe d. Crow v. Baldwins* and others, 5 *Durnf. & E.* 104., in this case was cited and relied upon, and its doctrine applied to the lands.

ANONYMOUS.

E. 17 G. 2.
Tuesday,
April 24th.

A Person arrested on Sunday on an attachment for a contempt (for a rescue) moved to be discharged; the counsel for the person in custody insisted on the attachment being set aside, and also on *Prinsep's* case, *Car. 2. c. 7. s. 6* and also on *Prinsep's* case, *Car. 602.*, which case was nothing to the purpose, there the arrest was held to be wrong because it was made by a process from the Court of Sessions after a writ to remove the proceedings, and this likewise

A person may be arrested on a Sunday on an attachment for a rescue.

WAS

1744.
ANONY-
MOUS.

was before the stat. 29 Car. 2. The words of the statute are "that no person shall serve or execute any writ process &c. on the Lord's day, except in cases of treason felony or breach of the peace; but that the service of every such writ &c. shall be void to all intents and purposes."

And we held that a contempt of this Court was a breach of the peace, and therefore denied the motion (a) The attachment was for a rescue which is certainly a great breach of the peace.

(a) So a person may be arrested on a Sunday under an escape warrant; Sir W. Moore's case, 2 Lord Raym. 1028; or if he has wrongfully escaped, he may be retaken on a Sunday without a warrant; *ib.* and *Atkinson v. Jamison*, 5 D. & E. 25; and *Featherstonehaugh v. Atkinson*, Barns 373. But bail cannot take the defendant on a Sunday in order to surrender him. *Brookes v. Warren*, 2 Bl. Rep. 1273; nor can a defendant, who has been convicted on a penal statute, be arrested on a Sunday for nonpayment of the penalty. *R. v. Myers*, 1 D. & E. 265. Nor can a rule nisi for an attachment for nonpayment of a sum of money pursuant to the Master's allocatur be served on a Sunday. *M'Ubban v. Smith*, 2 D. & E. 86.

E. 17 G. 2. BARKER Assignee of the Sheriff of BERKS against
Wednesday, HORTON.
April 25th.

It not appearing in a declaration by the assignee of a replevin bond that the plaintiff was the avowant or person making cognizance, the court of themselves referred to the replevin suit, it being of record in this court, and

"THIS was an action of debt brought by the plaintiff, as an assignee of a replevin bond, by virtue of the statute 11 Geo. 2. c. 19. And there being no one for the defendant, who put in a general demurrer to the declaration, and *Belfield* praying judgment for the plaintiff, we were just going to give judgment accordingly, when Mr. J. Burnett started an objection that the act of parliament only authorised the sheriff to make an assignment to the avowant or person making cognizance in a replevin, and that it did not appear from so much of the pleadings in the replevin as are set forth in this declaration that the plaintiff in this cause either avowed or made cognizance, and he might plead some other plea, and then would not be entitled to an assignment (a). He is indeed called the avowant

this declaration concluding *prout patet per recordum &c.*

(a) But if the plaintiff in replevin do not appear in the county court and prosecute according to the condition of the replevin bond, the defendant is entitled to an assignment of the bond. *Dias v. Freeman*, 5 D. & E. 195; in which case it was also ruled that the assignee of a replevin bond may sue in the superior courts though the replevin be not removed out of the county court.

nt in replevin at the beginning of the record. But 1744.
 other *Burnett* thought that not sufficient.
 upon reading over the record, I observed that after
 laration has set forth the account of the proceedings
 replevin cause, it concludes in this manner; "As
 record of the judgment remaining in this court
 ft other things more fully it doth appear." And it
 a record of our court, I thought that were ob-
 o take notice of it, and therefore sent for the roll,
 ch it appeared that the present plaintiff put in an
 in the replevin cause. With this my Brother
 was satisfied; and we gave judgment for the
 f."

BARKER
 against
 HORTON.

UGH SMITHSON Assignee of a Sheriff against E. 17 G. 2.
 THOMAS SMITH an Attorney. Wednesday,
 April 25th.

OTION was made by *Prime* to stay proceedings If a rule be
 on the bail-bond, bail being regularly put in in the moved for
 l cause before the assignment of the bail-bond; rule to stay the
 id now *Willes* and *Bootle* shew cause against the rule. proceedings
 on a bail-
 bond it must

original action was brought against *William Smith* not be intitled in the
 who put in bail in the following manner; the con- original
 of the recognizance of bail was that if judgment cause, but in
 be given against *William Smith* gentleman, who the action
 rested by the name of *William Smith* clerk, in the on the bail-
 a of trespass on the case, then the said *William* bond.—If a
 gentlemen, who was arrested by the name of defendant,
Smith clerk, should satisfy all the damages which who is ar-
 said Sir *Hugh Smithson* against the said *William* rested by a
 gentleman, who was arrested by the name of *William* wrong addition to his
 clerk, should be adjudged, or render his body &c. name, put
 in bail thus,
A. B. gent.

it was objected by the counsel for the plaintiff; who was
 at the rule was made in a wrong cause, for that it arrested by
 o have been made in the original cause; 2dly, of the name
 ie defendant has not put in any bail; for that he clerk, he is
 o put in bail with the same addition by which he not thereby
 d, so that this bail must be taken to be put in for estopped to
 another plead in a
 batement to
 the original

t he was sued by the wrong addition. Whether he is estopped to plead this
 ent in an action on the bail-bond? QU. BARNES 94. 2. C.

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SMITHSON
against
SMITH.

another person and not for the defendant. 3dly, That the Court need not interpose in this summary way, but that the defendant in this cause may plead *compertuit ad diem* if the bail were rightly put in. 4thly, That the plea put in by the defendant in the original cause in abatement could not be allowed, because he entered into the bail-bond by the name of *W. Smith* clerk (as was admitted), and therefore was estopped to say that this was not a right addition. And the counsel cited 1 *Salk.* 7., and 6 *Mod.* 225; 311: but they were nothing to the purpose.

And we were of opinion against the plaintiff in omnibus.
For

1st, The rule was in the right cause. If it had been made in the original cause it had been wrong, not being to stay any thing in that cause but to stay the proceedings in the action brought on the bail-bond.

2dly, We were of opinion that the bail was rightly put in; and the officers of the court all certified that this was the usual form in these cases. And if the defendant were so put in bail otherwise, (and as the plaintiff would have him) he would be deprived of his plea in abatement because he would certainly be estopped (a).

3dly, We would not oblige the party to plead *compertuit ad diem* in so plain a case, which would be only to occasion delay and expence; to prevent which these sort of motions have been always allowed.

4thly, Upon this motion we have nothing to do with the plea in abatement in the original cause, but the plaintiff may demur to it if he please: but we gave him no encouragement, because we declared our present opinion to be that he could not be estopped by the bail-bond in this cause,

(a) If the defendant omit to plead a misnomer, he may be taken in execution by the wrong name; *Gravesford v. Satchwell*, 2 *Str.* 1218. But if an officer under a distringas against C. B. to compel an appearance take the goods of A. B., he cannot justify it in trespass brought by A. B.; though he aver that A. B. and C. B. are the same person, unless A. B. appeared to the first action and omitted to plead the misnomer in abatement. *Cot v. Hinson*, 6 *Durnf. & East* 234.

case, though perhaps he might, if he were to plead in abatement in an action brought on the bail-bond (a).

1744.

SMITHSON
against
SMITH.

We therefore made the rule absolute, and with costs."

(a) Vid. *Evans v. King*, E. 18 Geo. 2. post, and the cases there cited. A plea in abatement of misnomer of the defendant beginning, "And the said Richard sued by the name of Robert" is bad, because the defendant thereby admits himself to be the person sued. *Roberts v. Moon*, 5 Durnf. & East 487.

KENWARD against KNOWLES.

E. 17 G. 2.
Tuesday.
May 1st.

THIS came before the Court on a case reserved at the A Baptist
Surry assizes. To trespass for breaking and entering preacher
the plaintiff's house and taking his goods the defendant qualified ac-
pleaded not guilty; and at the trial justified under the stat. cording to
10 Geo. 2. c. 18. for rebuilding the parish church of St. stat. 1 W.
Olave in Southwark and London by a distress for nonpay- and M. c.
ment of a penalty of 10*l.* forfeited by the plaintiff for 18. is ex-
refusing to take upon him the duty or office of one of the emptied
collectors of the rates and duties for rebuilding the church from serv-
under that act (b). ing all
parish of-
fices, whe-
ther they
existed be-
fore or
were creat-
ed since that
act, even
tho' he be
also engag-
ed in trade.

It appeared that the plaintiff for several years before had been and was at the time of being nominated one of the collectors a merchant or dealer in hops and a substantial inhabitant and parishioner of St. Olave; and was also a minister preacher or teacher of a congregation of protestant dissenters, who scruple the baptising of infants, commonly called Baptists. The congregation or place of meeting was duly certified and registered as required by the Corporation act, 1 W. and M. c. 18. (c); according to the

(b) By 10 Geo. 2. c. 18. s. 2. certain rates and duties are to be paid. By sect. 5. six collectors are to be annually chosen at a vestry from among the substantial inhabitants of the parish. By sect. 7. a penalty of 10*l.* is inflicted on any person, chosen a collector, for neglecting or refusing to perform such duty or office. And by sect. 8. persons, who have served the office of collector, are exempted from serving the office of scavenger for the parish.

(c) The eleventh section of which enacts "that every teacher or preacher in holy orders or pretended holy orders, that is a minister preacher or teacher of a congregation, that shall take the oaths herein required, and make and subscribe the declaration aforesaid, and also subscribe &c., shall be thenceforth exempted from serving upon any jury, or from being chosen or appointed to bear the office of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred of any shire city town parish division or wapentake."

1744. the directions of which act the plaintiff had duly qualified himself as a Baptist teacher or preacher. It was also proved that ever since the toleration act it had been usual for Baptist ministers in many instances to carry on secular business or employment. The question reserved was whether the plaintiff as such minister was exempt from serving the duty or office of collector.

KENWARD
against
KNOWLES.

After argument by *Wynne* Serjt. for the plaintiff, and *Skinner* Serjt. for the defendant,

The Court gave judgment for the plaintiff (a).

(a) The following account of this case is taken from Mr. J. *Almy's* MS.

"*Per Curiam*. This is an extremely clear case. The case was not reserved from any doubt in the Judge who tried the cause, but from the opportunity of counsel. The toleration act is grounded on natural rights, and the highest natural right is that of the conscience. The statute ought to receive a large and beneficial exposition, if the case wanted it: but the present is not only within the intent but also within the very letter of it. Every person who is in holy orders, and is a teacher qualified according to 1 *H.* and 1 *M. c.* 18, is exempted from serving any parochial office or other office in any parish &c.; the plaintiff is so qualified, and therefore is exempted. This is a parochial office in the nature of it; the stat. 10 *G. 2.* calls it an office. It is appointed to by the parishioners, and exercised in a parish. The addition of the plaintiff's being a merchant or a dealer in hops varies not the case; it does not destroy the privilege any more than a clergyman's holding a farm or exercising any temporal office. The toleration act exempts teachers from all future (1) offices. Judgment for the plaintiff."

(1) This was said in answer to one of the defendant's arguments that the toleration act only gave an exemption from offices then in existence, and that the office in question was created by a subsequent statute.

F 17 G. 2. **TRIBE and Another Assignees of R BURCHALL**
Wednesday, a Bankrupt against WEBBER.
May 2d.

Where a debtor gives bail on an arrest, and afterwards surrenders himself in discharge of his bail, and then lies in prison two months, he becomes a bankrupt from the time of his going to prison, not from the time of his arrest.

ASSUMPSIT for money had and received to the use of the assignees by the defendant, who pleaded the general issue. On the trial a verdict was given for the plaintiffs for 365*l.* 18*s.*, subject to the opinion of this Court on the following case.

The bankrupt for many years before and at the time of his bankruptcy was a scrivener. On the 23d of June 1740 he was arrested by the sheriffs of London at the suit of the plaintiff

Bull. N. P. 38. 7 *Via. Abr.* 64. note, S. C.

Tribe in an action of debt on bond for 2000*l.*; put in special bail. On the 13th of *April* 1741 rendered himself to the King's Bench prison in lieu of his bail to that action and also in discharge of his bail to several other actions, and from that time continued a prisoner there for two months and up-

1744-

 TRIBE
 against
 WEBBER.

On the 3d of *April* 1742 a commission of bankruptcy issued against him on the petition of the plaintiff *Tribe*, was declared a bankrupt, and the plaintiffs were his assignees. The bankrupt being indebted to the amount in 365*l.* 18*s.*, and *P. Meyer* being also indebted to the bankrupt in a larger sum of money, *Meyer* by order and on the account of the bankrupt paid to the plaintiffs the several sums following at the days hereafter noted,

			<i>l.</i>	<i>s.</i>	<i>d.</i>
January 1740, <i>i.</i>	-	-	47	0	0
January 1740, <i>i.</i>	-	-	300	0	0
August 1741, when the bankrupt was prisoner, as above	-	-	18	18	0

365 18 0

the two first sums paid by *Meyer* to the defendant bankrupt's account were paid after the bankrupt's surrender to prison in discharge of his bail, and the last sum was paid four months after his imprisonment.

The question referred for the opinion of the Court was whether *Burchall* was a bankrupt from the 23d of *June* 1741 when he was first arrested (*a*), or only from the 13th of *April* 1741, when he surrendered himself to prison in lieu of his bail.

The case was argued on the 7th of *February* last by Serjt. for the plaintiffs and *Bellfield* Serjt. for the defendant, and again on this day by *Birch* King's Serjt. for

By Stat. 21 Jac. 1. c. 19. s. 2. it is enacted that every person being indebted to any person in 100*l.*, shall not pay within six months after the same shall grow due, and the debtor be arrested for the debt, or "being arrested for debt, shall after his or her arrest lie in prison two months or more upon that or any other arrest or detention for debt," or being arrested for the sum of 100*l.* of just debt any time after such arrest escape out of prison, or procure his escape by putting in common or hired bail, shall be adjudged a bankrupt; "and in the said cases of arrests, or lying in prison for such debts, or getting forth by common or hired bail, from the time of such first arrest."

H h

the

plaintiffs as to the rate of 10s. 10s. and
verdict to be entered up for that sum.

(a) The reasons given by the Court for the judgment in the Lord Chief Justice's note books, but the following taken from Mr. Justice Abney's MS.

"*Willes*, Chief Justice. The words of the stat. 21 J¹ and therefore the Court are so to expound the statute if conveniences may arise. Though the reporters are but yet all the three cases cited are with the defendant. Bankruptcy commence from the arrest when the imprisonment for some months or perhaps years would destroy all trade and destroy all credit; and therefore if by any possible construction prevented, we will certainly do it. Now the statute is a construction. The words "after his or her arrest" *currente calamo*, and can be of no use but to confound, and lying in prison two months or more" is an act of any common person would understand that the lying instantly and immediately follow the arrest. *Lying in prison* be explanatory of what the *arrest* meant. The plaintiff's case will be entitled only to the 18th. 18th., that having the bankrupt's yielding himself to prison; which is an act the stat. 13 *Eliz*.

Burnet J. The words "after his or her arrest" comprehend imprisonment; otherwise an imprisonment ten years after a date to an arrest ten years before.

Abney J. Bankruptcy in my opinion ever was and yet a crime, whatever tradesmen may now think of it. punished with corporal punishment; the body lands and day subject to the commissioners. Now bankruptcy is an arrest is the act of a stranger; I cannot prevent a man's I can prevent imprisonment, for in less than two months. The concurrent cases are with the defendant; and the convenient is very cogent."

—But where sham bail is put in before a Judge, as a defendant turned over to the prison of the court, and I considered accordingly the imprisonment is to be on

1744.

WILLIAM CRISPE *against* WILLIAM PERRIT.E. 17 G. 2.
Saturday,
May 5th.

HIS was a case reserved in an action of trover. The plaintiff brought his action by the direction of the Lord Chancellor against the defendant as assignee under a separate commission of bankrupt awarded against the plaintiff, dated the 2d of *February* 1742 upon the petition of the defendant, in order to try whether the plaintiff or were not a bankrupt on or before the said 2d of *February*. Upon the trial it appeared that the plaintiff was a joint trader with two others at the time of issuing the separate commission; that the plaintiff had committed an act of bankruptcy before the issuing thereof; that the plaintiff was jointly concerned with two others in the erection of the amphitheatre in *Ranelagh Gardens* at *Chelsea*; and that the defendant was employed by the plaintiff and his partners in doing the plasterers' work there, by reason whereof the plaintiff and his partners became jointly indebted to the defendant in the sum of 426*l.* or. 4*½d.*; the same was due and owing to the defendant before an act of bankruptcy and at the time of suing out the commission. It did not appear that there was any separate debt due from the plaintiff to the defendant on any account severally, or that either of the other partners had committed any act of bankruptcy.

A separate commission of bankrupt may be taken out against one of several partners on the petition of a joint creditor.
1 Atk. 133.
8. C.

The question reserved for the opinion of the Court was whether a separate commission can be taken out against the plaintiff upon the petition of one who is only a joint creditor.

After two arguments at the bar, the first on the 21st of *January* 1743 by *Willes* King's Serjt. for the plaintiff, by *Prime* King's Serjt. for the defendant, and the second by *Skinner* King's Serjt. for the former and *Wynne* for the latter on the 3d of *February* 1743, the Court gave time to consider the case; and on this day the opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "In order to determine the question it will be proper to consider,

H h 2

1st,

and on the other.

First; A bankrupt is not considered as a person, but as one who has been guilty of a crime, therefore in the four first statutes concerning him is frequently called *an offender*, and in all of them is considered as one who has endeavoured by fraud to cheat and deceive his creditors and to prevent recovering their just and honest debts. And in all the statutes that are made concerning bankrupts are made liable to several very great penalties for the same reason it is expressly said in the stat. 21 Geo. 3. which is the governing statute concerning bankrupts, that all and singular the statutes concerning them shall be things largely and beneficially construed as for the aid help and relief of the creditors of bankrupts, and this rule has always been adhered to in the justice in the construction of all the statutes concerning bankrupts. As therefore a bankrupt is considered as a criminal, it seems a little absurd if there be two partners, and one commits a crime, shall not be liable to be punished because the other is innocent. It would indeed be unjust to punish one partner for the crime of the other: and it would be equally unjust to excuse the partner who is guilty for the sake of the other who is innocent, and to the prejudice of other innocent persons, as is presently that it plainly would be if a commission were taken out against one partner becoming bankrupt. The nature therefore of a bankrupt seems to require an argument in favour of what is contended for.

at the 10 *An. c. 15.*, and the 5 *Geo. 2. c. 30.*; and though the word *partners* is mentioned in the latter, it is not in respect to another thing and not at all to this purpose. On the other hand, it must be agreed that the words in all the other statutes are general, and that where the words *creditors* and *debts* are mentioned in any of them, there are no words to confine or restrain them either to private or partnership debts, but the words *creditors* and *debts* may be construed to comprehend both, and therefore ought to be construed according to the rule I have before laid down in the most large and beneficial sense for the creditors. If therefore I make it appear that it is most beneficial for the creditors to construe these words in the sense contended for by the defendant, nay that it would deprive the creditors in many cases of the benefit intended them by these statutes to construe them in another sense, this likewise will afford another very strong argument in behalf of the defendant. I do not rely much on the stat. 10 *An. c. 15.*, though it was so much relied on by the counsel for the defendant, because the words of that statute may be satisfied only by admitting that a separate commission may be taken out against a partner upon the petition of a separate creditor, which is admitted by the counsel for the plaintiff may be done; and to be sure many cases have been sued out. The words are (after stating a case about whether the discharge of a bankrupt by virtue of an act 4 *An. c. 17.* should be construed to discharge the partners of such bankrupt from the same debt) "that by the discharge of any bankrupt by force of the said act or any other acts relating to bankrupts from the debts by him due and owing at the time that he did become a bankrupt shall not be construed nor was meant or intended to release or discharge any other person or persons who was or were partner or partners with the said bankrupt in trade at the time he became a bankrupt, or then stood jointly bound or did make any joint contract together with such bankrupt from the same debt or debts from which he was discharged as aforesaid: but that notwithstanding such discharge such partner and partners joint obligor and obligors and joint contractors with such bankrupt as aforesaid shall be and remain chargeable with and liable to pay such debt and debts and to perform such contracts as if the said bankrupt had never been discharged from the same." Now though a commission be taken out against a partner on the petition of

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 CRISP
 against
 PERKINS.

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 CRISPE
 against
 PERRETT.

of a separate creditor, it might be argued that a certificate under that commission would discharge the bankrupt both from his partnership and separate debts, both because the words of the stat. 4 & 5 *An.* are general, and likewise from the reason of the thing because a partnership creditor may come in, if he please, and receive a satisfaction under such separate commission. This might occasion a doubt, and was a great doubt in *Westminster-Hall*, and therefore was a sufficient reason for the declaration in this clause, even though a separate commission could not be taken out against one partner for a partnership debt. We therefore do not think that any thing can be inferred from this statute.

Thirdly; I will now consider the only material cases that were cited; or that I can find in any of the books; and they give but very little light in respect to the point in question. The case of *Richardson v. Goodwin*, 2 *Vern.* 293, and that *Ex parte Crowder*, *ib.* 706, only shew in what manner the effects shall be distributed, and how in case of a bankruptcy of one or both of the partners the joint and separate debts shall be paid out of the joint and separate estates. But in the first case it does not appear whether the commission were taken out against one partner upon the petition of a joint or separate creditor; and by the state of the case I should be inclined rather to think the latter. And in the other case both the partners were bankrupts, and a joint commission was taken out against them. The case *Ex parte Cook*, 2 *P. Wms.* 500, is the same as the case of *Crowder* in *Vernon*; for there likewise both the partners were bankrupts, and a joint commission was taken out, and therefore it is nothing to the present purpose. Indeed in that case there were likewise two separate commissions taken out afterwards, but Lord Chancellor *King* held that it was fruitless and vexatious, for that the separate creditors might have come in under the joint commission and have had the same advantage and relief as they could have under their separate commissions.

There are indeed three cases that seem to be in some degree material; not that they prove that such a separate commission has ever been taken out on a partnership debt, but they shew that bankruptcy has been sometimes considered as a determination or a severing of the partnership,
 and

and that from that time the bankrupt has been considered as a separate person both in respect to the demands which he has against others and the demands which others have against him even upon the partnership account; and if so, the arguments against the present commission fall to the ground at once. The first case of this sort is in 2 *Keb.* 30, the case of *Thomas v. Day*, where it was holden that an assignee of one partner, a bankrupt, may bring an action *perov*er against the other for his share of the partnership debts. The next book where the same doctrine is advanced is in 1 *Mod.* 45: but there it is only the saying of *Twissden J.*, and not any case determined by the Court. The words are "If there be two partners, and one break, we shall not charge the other with the whole debt, because it is *ex maleficio*: but if there be two partners and one die, the survivor shall be charged with the whole; and therefore a motion that one who was partner with another who was a bankrupt might, upon his being arrested, put in bail for the bankrupt as well as for himself, was denied. The last case upon this head is a case *Ex parte Smith*, reported in 1 *P. Wms.* 237: *B.* and *C.* were bound in a debt to *A.*; *B.* became a bankrupt; and it was holden by Lord Chancellor *Harcourt* that the money being lent to them both *A.* the obligee should come in as a creditor under the commission only for a moiety of the debt. To be sure the determination of Lord *Harcourt* was a right determination in equity; and in commissions of bankrupt, which are founded upon equity, the equity of the case ought principally to be considered. Whether or not the law will hold, as it is laid down in the two other cases, I will not take upon me to say, but it is highly reasonable that it should be so; and if the law were so (as I said before) there would be an end of the dispute. But for the reasons which I shall give presently, I think we may venture to determine the present question without relying on the authority of these cases, and the rather since the law, however it was before, is now altered by the stat 10 *An c.* 15; and in case of the bankruptcy, the other partner may be sued for the whole debt at law.

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CRISPE
against
PEARITT.

Fourthly, I come now to the precedents. It was rightly said by my Brother *Willes*, as the rule is laid down by Lord

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 against
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Lord *Coke*, that where a thing has never been done, it is a strong argument that it ought never to be done (*a*): but it is but an argument, and is of less force in the present case than in most others, because the petitions and commissions are usually in general terms, and it very rarely appears from them whether the commission were sued out on a joint or separate debt. But it never having been determined that there may not be such a commission, as is contended for by the defendant, affords some argument for him. For it can hardly be imagined but that this case must have frequently happened, and that such commissions must have been taken out; and if they have, they have always been proceeded on and have never been set aside. To shew that there have been such commissions, and in some measure to answer this argument of want of precedents, the defendant has produced two; the one in the time of Lord *Macclesfield*, and the other in the time of Lord *Talbot*, both very great Chancellors. That in Lord *Macclesfield*'s time was a commission taken out against *H. Hewett* (*b*); and there it appears on the face of the petition that he and one *William Raphson* were partners, that he only became a bankrupt, and that the debt of the petitioning creditor was a joint debt owing from both of them: it was on the 10th of *February* 10 *Geo. I.* The other was the case of *Patrick Crawford* (*c*), who was a partner with *John Crawford*, and against whom a separate commission was taken out in 1733. It does not appear there upon the petition that it was a joint debt: but from what was said by the counsel in their argument on a petition preferred to the Lord Chancellor concerning the allowance of the certificate and by the Lord Chancellor himself, it seems that it was obtained upon the petition of a joint creditor, and that the Lord Chancellor was of opinion that it was right. For the counsel said that a joint creditor, under pretence of being a creditor, had taken out the commission, and made it an objection to the commission; to which the Lord Chancellor said, "Where one partner becomes a bankrupt and the other not, a commission will go against him, for he owes the debt, and it is right." This case therefore is not entirely without precedents. But

Lastly,

(*a*) *Co. Lit.* 81. *b.* (*b*) *Co. Bank. L.* 17. 4th edit. (*c*) *Id.*

ally, What we principally found our opinions upon
e reason and justice of the case. The objections
st it were,

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against

PEARITT.

t, That it was not a debt within the meaning of the
because it was not such a debt for which an action
I have been brought singly against him.

ly, That this would produce great inconvenience and
in marshalling the partnership effects, and that
innocent partner might be very much affected thereby.

s to the first objection; none of the acts say that it
be such a debt for which an action may be brought
st him; and the stat. 7 Geo. 1. c. 31. has determined
a creditor may come in under a commission even before
debt becomes due; and the 5 Geo. 2. c. 30. even that
a person may be a petitioning creditor. A partner-
debt is certainly the debt of each of the partners, and
judgment be obtained against them, either of them
the goods of either of them may be taken in execution
out the body or goods of the other: and a commission,
as been said in many cases, may be more properly
pared to an execution than an action.

s to the inconveniences, they will be just the same in
y respect to the other partner if a commission be taken
against one partner for a separate debt, which is admit-
by both sides to be right; for there the bankrupt's share
the partnership effects must be taken and sold under the
mission, only making satisfaction for the partnership
as if such creditors choose to come in under such com-
mission, as they have generally done. But on the other
d, there would be the greatest inconvenience and a plain
act in the law if such commissions could not be sued
out. Suppose the case of two partners, one an infant or
lunatic and the other a bankrupt, the creditors would be
without remedy under the statutes of bankrupt if such a
commission could not be sued out, for an infant or a lu-
c(a) cannot be a bankrupt. Suppose two are jointly
ind in a bond, one a trader and the other not, the trader
comes a bankrupt; there likewise the obligee would be
without remedy under the statutes of bankrupt, if the
plaintiff's

(a) In the instance of *P. Crawford*, before alluded to, his partner *John*
Crawford was a lunatic, and so found on a commission of lunacy three
years after *P. Crawford* was declared a bankrupt.

1744.

CRISPE
against
PERMITT.

plaintiff's doctrine were to prevail, and the offender would escape unpunished. He would not perhaps be quite without remedy at law, for he might outlaw the bankrupt: this would be a very tedious and expensive method, while the statutes of bankrupt were plainly intended to give creditors of the bankrupt relief in a cheap and expedient way. The only answer that I can think of that is given to any of these arguments is, that a commission be taken out against the bankrupt by a separate creditor on his separate debt, and then his joint creditors come in if they please under this commission and common justice will be done. This looks plausibly; but when considered it is no answer; for many cases may happen in which a partner bankrupt may have no separate creditors, and none of the value prescribed by the statutes, and there will plainly be a defect of justice unless a commission may be taken out upon the petition of a joint creditor.

For these reasons we are of opinion that the petition for a commission was rightly sued out. Whether or not it appears by the petition that the bankrupt's share of a joint debt alone amounts to 100*l.* (a), or whether the joint debt must be considered as the bankrupt's debt, is not necessary now for us to determine, because there are but three partners in the present case, and as the value proved is 426*l.*, his third part plainly amounts to more than 100*l.* Nor do we determine at all in what manner the effects shall be marshalled upon such commission, this being the proper business of the Court of Chancery, to which we have nothing to do.

All that we determine is that a separate commission may be sued out against a partner (b), who is a bankrupt, by the petition of a joint creditor; the consequence of which is, that a verdict must be entered up for the defendant according to the rule (c)."

(a) It was only stated in the petition on which *H. Hewett* was declared a bankrupt, *sup.* 472, that the joint debt due from *H. Hewett* as partner amounted to "100*l.* and upwards."

(b) But a commission of bankrupt cannot be sued out against a bankrupt partner: *Allen v. Downs*, *M.* 25 Geo. 3. B. R.

(c) *Vid.* *Fox v. Hanbury*, *Cowp.* 449.

1744.

LIAM BULLYTHORPE *against* ELIAS TURNER.E. 17 Geo. 2.
Monday,
May 7th.PLEVIN for taking the plaintiff's goods at the parish
in *Mary le Bow* in the ward of *Cheap* in *London*.A declarati-
on in reple-
vin is bad,
if it do not
specify the
place where
the goods
weretaken:
but if the
defendant
do not de-
mur, but
plead to it,
the defect is
cured.

the defendant prayed *judgment of the declaration*, be-
cause he took the said goods and chattels in the parish of
Martin Ludgate without in the ward of *Farringdon*
in *London* in a certain dwelling-house there called
White Swan, without this that he took them at the
parish of *Saint Mary le Bow* in the ward of *Cheap*; and
he is ready to verify, wherefore he prays *judgment of*
the declaration. And in order to have a return of the
writ, he avowed taking them in the parish of *Saint Mar-*
tin Ludgate without in the said ward of *Farringdon without*,
before the time when &c., to wit, the plaintiff before the time when &c., to wit,
three quarters of a year ending on the feast of the
Annunciation &c. 1739, and from thence continually until
the time when &c., enjoyed a certain messuage &c.
situate in the *Strand* &c. under a demise thereof to him
by the defendant at the yearly rent of 50*l.* payable
yearly &c., and 12*l.* 10*s.* for one quarter ending at
the said feast of the *Annunciation* &c. were due, whereof
the defendant afterwards and before the said time when
on the 26th of *March* 1739 received 50*s.* parcel
of; and 10*l.* residue were and still are unpaid &c.
the plaintiff within thirty days before the said time
&c. to wit on the 24th of *March* 1738 fraudulently
clandestinely conveyed away the said goods from the
premises to the said dwelling-house in the
parish of *Saint Martin Ludgate* &c. to prevent the
defendant distraining the same for the said rent; and be-
cause the said 10*l.* were in arrear and unpaid at the time
&c. the defendant well avows taking the said goods
fraudulently and clandestinely conveyed away and found
the said dwelling-house in the parish of *Saint Martin*
in the Strand &c., within thirty days &c., for and in the name
of distress for the said rent &c.

—A plea of
ceper in alio
loco, is a
plea in bar
though it
pray *judg-*
ment of the
declaration.
—If the
plaintiff in
his replica-
tion do not
answer
some mat-
ter contain-
ed in the
plea, or an-
swer it im-
properly,
the defend-
ant must
demur to it.
—In reple-
vin the de-
fendant
pleaded ce-
per in alio
loco and
avowed
taking the
goods in the
place in
question.

The

if they had been fraudulently conveyed within thirty days &c. from the de-
mises, as a distress for rent. the plaintiff in his plea in bar traversed the
rent, and took no notice of the plea; and it was holden ill on demurrer, the avowry
being the nature of a suggestion to entitle the party to a return of the distress and
returnable.

353. and Bull. N. P. 53. S. C.

1744
BULLY-
THORPE
against
TURNER.

The plaintiff in his replication said that the defendant ought not to avow &c., because he (the plaintiff) at any time before or since the said feast day and within thirty days &c. did not fraudulently and clandestinely convey away the said goods &c. in manner and form as the defendant in his plea alleged; and of this he put himself upon the country.

To this the defendant demurred, and prayed judgment and a return of the goods, together with his damages and costs; and for causes of demurrer said that the plaintiff had concluded his said plea by putting himself upon the country, whereas he ought to have concluded it by praying that the matter therein contained might be inquired of by the country; and also for that the said plea was uncertain, and put a matter in issue which was not issuable &c.

This case was argued at three different times, *May* 13th 1740; *May* 20th 1742; and *June* 15th 1743; and on this day the opinion of the Court was delivered, as follows, by

Willes Lord Chief Justice. "Objections in this case have been taken to the declaration, the plea, and the replication.

1st, The declaration is certainly not good because it does not set forth the place in which the goods were taken, which it ought to have done, that the defendant might know with certainty to what he is to answer; and therefore if the defendant had demurred, judgment in chief must have been given against the plaintiff and a return of the goods awarded; as was holden in the case of *Ward v. Savile*, Cro. Eliz. 896, and *Moore* 678; in the case of *Read v. Hawke*, Hob. 16; and in an old case there cited 35 Hen. 6. fo. 40. But it is said there, and to be sure the law is, that if the defendant plead over, this defect is cured (a). This objection therefore will not hold in the present case, because the defendant has not demurred but pleaded over.

2^{dly},

(a) So any defect, arising from the uncertainty of the goods mentioned in the declaration, is cured by the defendant's avowing. *Bern v. Mottin*, Caf. temp. Hardw. 119; 2 Str. 1015; and *Bull. N. P.* 53; and *Kempster v. Nelson*, T. 1 G. 1. B. R. 6 Bosc. Abr. 71. 68. ed. cited and relied on by Lord Hardwicke; Rep. temp. Hardw. 121, in which a contrary decision of *More v. Clyffam*, All. 32, and Sty. 71, was overruled.

adly, The plea of the defendant is certainly good, and the replication of the plaintiff undoubtedly bad; because he has said nothing to the plea, but has traversed the recovery which is not traversable, but is only in the nature of a suggestion in order to have a return of the goods.

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against
TURNER,

That this was a bad traverse was agreed in the case of *lake v. Foot*, *Salk* 93, and *Carth* 139; in an anonymous case *Salk*. 94; and in another anonymous case 1 *Ventr.* 17, and in many other books, and was not denied by the counsel for the plaintiff; and therefore judgment must be for the defendant for the defect in the plaintiff's replication.

But the only question is, what judgment the plaintiff is entitled to. The defendant insists that he is entitled to a judgment in chief. The plaintiff says that at most he is only entitled to a judgment in abatement, but insists that the suit is discontinued by the defendant's demurring to the plaintiff's replication, and that therefore the Court can only give judgment that the suit be discontinued.

To shew that at most there can only be a judgment in abatement, the plaintiff insisted on two things;

1st, That the defendant's plea is only a plea in abatement.

adly, That if it were a plea in bar, yet that it is only pleaded in abatement; and as a man may pray a less judgment than he is entitled to, the Court can only give such judgment as is prayed, the Court in this case can only give judgment in abatement. To shew that a matter in bar may be pleaded either in bar or abatement, was cited the case of *Stubbins v. Bird*, 2 *Mod.* 63, 64. and several other cases; and this point was not controverted by the counsel on the other side. But it was insisted by some that this is a plea in bar, and that it is pleaded in bar and not in abatement.

And we are all of that opinion.

First, We are of opinion that the plea of *cepit in alio loco* is a plea in bar, for the following reasons;

1st,

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THORPE
against
TURNER.

1st, Because the place (a) in replevin is of the essence of the action, otherwise a defendant in replevin could not demur for want of a certain place in the declaration; which, as I have shewn before, he certainly may; nor can he avow in any other place, without denying the place laid in the declaration. And it is for this reason that, though a plaintiff may bring a new replevin for taking in another place, he cannot bring one for taking in the same place; and so, if he be nonsuit in replevin, and afterwards bring a writ of second deliverance, he cannot declare in a different place or vill from what he laid in his first declaration: and so it is holden in *Bro. Abr.* "Second Deliverance," pl. 5.

2dly, It has been holden that in a plea in abatement you cannot object to any defect in the declaration; and so is the case of *Hastrop v. Hastings*, *Salk.* 212.

3dly, Upon enquiring of the officers both in this Court and in the King's Bench, an affidavit is never made of the truth of this plea, as is required in pleas in abatement by the stat. 4 & 5 *Anne* c. 16. Nor are defendants obliged to put in such pleas within the first four days of the term, as pleas in abatement must be put in by the course of the Court.

4thly, It appears by the manner of pleading these pleas, and the judgment given upon them, that they have always been considered as pleas in bar. So it appears by *Bro. Abr.* "Replication," pl. 1. *Rast. Entr.* 555, pl. 4, 5, and 6; 556, pl. 7; *Thomp. Entr.* 274, pl. 11; *Clift's Entr.* 644; and in many other books which it would be too tedious to mention; in all of which the prayer is that the declaration may be quashed. There are indeed three entries in *Rast.* 554, which are different. The first prays judgment of the writ and declaration; the two other judgment of the writ, and that the writ may be quashed. But these prove nothing, because as I have already shewn a plea in bar may be pleaded in abatement. But the others prove very strongly that it is a plea in bar, because a plea in abatement cannot be pleaded in bar. It was indeed said that this prayer of a judgment, that the declaration might be quashed, was not a prayer of a judgment in chief, but only of a judgment in abatement; and the case of *Croft v. Bisson*, as reported in 6 *Mod.* 103, and *Foot's case* in *Salk.*

(a) *V. d. Walton v. Kerfoot*, 2 *Will.* 354.

Salk. 93, and *Carth.* 139, seem to countenance this opinion. But it is contrary to all the other cases and a multitude of precedents, which I shall mention by and by when I come to that point.

Lastly, this cannot be a plea in abatement, because whoever pleads a plea in abatement must shew that the plaintiff can have a better writ: whereas he can have no better writ in the present case; for it is in the usual form, as appears by the Register fo. 81; and *Glanville de legibus*, l. 12. c. 12.

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THORPE
against
TURNER.

As to the second point, that this though a plea in bar is pleaded only in abatement (a) in the present case, because it begins with praying judgment of the declaration, and concludes in the same manner. There are (as I have already said) but two cases that seem to favor this opinion, but there is a multitude of precedents which are otherwise in cases of demurrers to the declaration, where the judgment must be in chief; for there *cannot be a demurrer in abatement*, as was holden in the case of *Dominique v. Davenant*, *Salk.* 220. (b). I shall only mention some few of these precedents. *Co. Entr.* 3. b; 122. a; *Coryton v. Littlebye*; 2 *Saund.* 114; *Benson v. Welby*, *ib.* 150; *Wood v. Longuevill*, *ib.* 278; *Sacheverell v. Froggatt*, *ib.* 361; *Pinkney v. The Inhabitants of the East Hundred of the County of Rutland*, *ib.* 374: and as *Saunders* was so very learned a man and so well skilled in pleading, I think I need not mention any other authorities after him. But the same point was solemnly determined in the case of *Johnson v. Altham* both in this Court and the Court of King's Bench which came before that Court upon a writ of error, and was there determined *M. 12 An. (c.)*

There

(a) If matter, that ought to be pleaded in abatement, be pleaded in bar, it is bad. *White v. Willis*, 2 *Wils.* 87.

(b) Vid. *Rayner v. Pointer*, 5. 16 G. 2. C. B. *sup.* 410.

(c) This case is not clearly reported in 10 *Mod.* 192, 210, though it appears there that the judgment of the Court of Common Pleas was affirmed on error.—It was an action against an attorney in the Court of Common Pleas, who pleaded that there was no bill; and he prayed "judgment of the declaration aforesaid and that the said declaration should be quashed." The Court of Common Pleas gave final judgment against the defendant; and upon a writ of error brought in the King's Bench, the question was whether such plea with the conclusion were in bar or in abatement only, and so whether the judgment below should have been final, or only quod respondeat ouster. MS. coll. *Willes* Chief Justice.

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THORPE
against
TURNER.

There remains now but one point to be considered, whether this be a discountenance or not; and the reasons for it were two;

1st, That the defendant by his demurrer prays a judgment in chief, whereas by his plea he has only prayed a judgment in abatement; and if this were so, probably the plaintiff would be in the right. But, as I have already shewn that this plea is pleaded in bar, and that the defendant has there prayed judgment in chief, there is an end of this part of the objection.

2dly, But the principal reason was, that as the plaintiff in his replication has given no answer to the plea, the defendant should have taken judgment on nil dicit, and that by demurring to a void replication he has discontinued the action. And of this opinion Lord Chief Justice Holt seemed to be in the case of *Hale v. Foot*; but the other three Judges held the contrary, and Holt's opinion seems to have been founded on *Herlakenden's* case, 4 Co. 61, which is certainly not law. That was an action of trespass for entering the plaintiff's close, and committing several trespasses, and the defendant in his plea omitted giving an answer to one of them, to which the plaintiff demurred, and it was holden to be a discontinuance. But in the case of *Hughes v. Philips*, *Yelv.* 38. which was determined both in the Common Pleas and on a writ of error in the King's Bench, it was holden that where a defendant puts in a plea, though a defective one, the plaintiff may demur to it without discontinuing his suit, and is not obliged to enter up judgment on nil dicit. The same was also determined in the case of *Sir J. Thornel v. Lassels*, *Cro. Jac.* 27; which being a case almost directly contrary to *Herlakenden's* case, I will shortly state it. It was an action of trespass for entering the plaintiff's close, and committing several trespasses there with horses cows and oxen, the defendant justified putting in two horses under a right of common, but said nothing as to the oxen and cows; the plaintiff demurred, and judgment was given for him.

And as these cases are both subsequent to *Herlakenden's* case, and therefore of greater authority, so the reason of the case is plainly

ainly with these subsequent resolutions; for it is absurd to
 y, that the *defendant* can discontinue the plaintiff's action
 putting in a defective plea. If the plaintiff indeed in his
 plication omit to reply to part of the defendant's plea, he
 ay discontinue his own suit. But it is absurd to say that
 e defendant can do it, and yet according to this doctrine,
 we can the plaintiff avoid it if the defendant put in a de-
 fective plea? If he demur, it is said he discontinues his own
 it, for he ought to have entered up judgment by nil
 sit, considering it as no plea at all: but this, I think, is a
 advice that ought not to be encouraged; for it is saving
 at the plaintiff may judge for himself, without submitting
 a case to the judgment of the Court. If indeed there
 re no plea at all, the plaintiff might enter up such judg-
 ment: but if there be in fact a plea, though a defective one,
 hink that in all cases he ought to pray the opinion of the
 Court, which he can do no otherwise than by demurring,
 and not to judge for himself (a).

1744.

BULLY-
TROPP
against
TURNER.

Upon the whole we are of opinion that the defendant in
 present case is entitled to one of the two following judg-
 ments; either that the declaration shall be quashed, and that
 defendant shall go without day, and that he shall have a
 return of the goods, and also that he shall recover his costs;
 in this form, that the plaintiff take nothing by his writ,
 but that the defendant may go without day, and that he
 shall have a return, &c. and costs, as before. The first of
 the judgments is warranted by a precedent in 1 *Townsend's*
Book of Judgments, fo. 274; and the other by several prece-
 dents in *Coke's Entries*.

—“ But my Brother *Draper* desiring time to consider
 in what manner he should enter up his judgment, we gave
 him what time he pleased, only directing him to acquaint
 the Court before he entered up his judgment in what manner
 he intended to enter it up. And

Draper Serjt. after a long consideration moved the Court
 on the 8th 1744) to enter up judgment for the defen-
 dant after several continuances, in the following manner;

See Coppin qui tam v. Carter, 1 D. & E. 462; and *Theblisson v. Smith*,
 1 B. 152.

1744.

BULLY-
THORPE
against
TURNER.

"It seems to the justices that the plea of the plaintiff above in reply pleaded is not good, therefore it is considered that the plaintiff takes nothing by his writ, but that he be in mercy for his false claim thereof and that the defendant go thereof without day, and that he have a return of the goods and chattels, and in what manner &c let the sheriff make known here; and hereupon the said defendant according to the form of the statute &c also prays a writ of our Lord the King to inquire of damages &c; and it is granted to him returnable here at the same time &c;" which judgment, he said, was agreeable to the precedents in 2 *Temp. Judgments* (a), title "*Replevin*, and *Co. Entr.* 589. a; 594. a; 595. a; and 596. b.

And it was ordered by the Court that the judgment should be so entered up."

(a) P. 205.

E. 17 G. 2.
Monday,
May 7th.

ATKINSON against SETTREE.

[E. 16 GEO. 2. Rol. 861.]

THIS was a special action on the case. The first count stated that on the 11th of *December* in the 16th year &c at *Westminster* and within the jurisdiction of the court of our Lord the King of his palace of *Westminster* the plaintiff in order to procure the payment of the sum of 7l. 18s. which *Catherine Grimaldi* then owed him, by a certain writ *duly issued out of the Court of Record* of our said Lord the King of his palace of *Westminster* at the plaintiff's request, and directed to the bearers of the virge of the household &c, officers and ministers of the said court, commanding them to take the said *Catherine* by her body if she should be found within the jurisdiction of that court, and have her at the then next assizes to be holden on *Friday* the 17th of *December* then next answer &c, and procured the said *Catherine* to be arrested &c and to be there kept and detained in prison &c; afterwards on the said 11th of *December* in consideration of the debt from A., procured A. to be arrested by virtue of a certain writ &c *duly issued out of such a court*, it will be intended after verdict that the arrest was legal.

it the plaintiff at the request of the defendant undertook release and discharge the said *Catherine* from her said imprisonment the defendant promised to pay the plaintiff 7*l.* s. and also the costs and charges by the plaintiff expended that suit, with an averment that those costs amounted to 3*l.* 4*d.*, and that the plaintiff at the defendant's request discharged the said *Catherine* from her said imprisonment. There was a second count in the declaration, which, though varied from the first in several particulars, was equally good to the objection afterwards made to the first. There was also a third count for money had and received.

1744.
ATKINSON
ex dñst
SETTER.

The defendant pleaded the general issue, and at the trial the plaintiff obtained a verdict on all the counts, with 8*l.* 1*l.* 4*d.* damages.

A motion was made in *Michaelmas* term 1743 in arrest of judgment, which was opposed this day by *Prime* King's Ct. and *Wynne* Serjt. and supported by *Skinner* King's Ct. and *Draper* Serjt. and at a subsequent time

The rule was discharged (a).

I i 2

NORMAN

The grounds of the judgment are to be seen in Lord Chief Justice's books: but the following account is taken from Mr. J. Abney's *“Skinner and Draper Serjeants”* in arrest of judgment. First, It does not appear that any plaint was taken without that a *capias* ought to issue. Secondly, It does not appear the cause of action in the court below was within the jurisdiction, and the arrest was illegal, and there was no good consideration to support the promise. 1 *Rel. Abr.* 859; 2 *Mod. Rep.* 3 *Lev.* 23; 1 *Saund.* 74; 2 *Raym.* 1310. This is a void arrest, and therefore the discharge is no satisfaction. *Godb.* 358. *Skinner* and *Wynne* Serjts., for the plaintiff, insisted that to support this in the superior court it was immaterial whether or not there were a good cause of action in the inferior court, or whether or not the court below had a

jurisdiction. The declaration sets out the writ duly issued, commanding the bearer of the writ to arrest the party, if found within the jurisdiction, and there to detain her, *Salk.* 202, 2. And the case of *Peacock v. Roll* in 1 *Saund.* 74. relates only to cases determined in the inferior court: and brought up by error. The case of *Randal v. Harway* is better reported in *Palm* 394. than in *Godb.* 358. If the plaintiff's consent were necessary to release *Grimaldi*, and the officer could not discharge her without, then there is a good consideration to support the promise. They argued that it was not necessary that the arrest and detainer should be legal in order to make a good consideration: and for that purpose they cited 1 *Rel. Abr.* 12. pl. 12; 1 *Rel. Abr.* 19. pl. 6; *Hob.* 216; *Sir T. Raym.* 204; 1 *Rel. Abr.* 27. pl. 47. *Sty.* 249. Besides this is after a verdict, it having been proved to the satisfaction

1744.

M. 18 G. 2.
Wednesday,
Nov. 14th.

NORMAN *against* BEAMONT.

Verdict set aside, because one of the jurymen was not returned on the nisi prius panel but answered to the name of a person who was.

THE cause was tried at the last *Suffolk* assizes, and one *Richard Shepherd* was sworn upon the jury who gave a verdict for the Plaintiff, damages 1s. It was an action of trespass quare clausum fregit; and the judge certified that the trespass was voluntary and malicious, which shewed plainly that he was not dissatisfied (a) with the verdict. But upon an affidavit of *Shepherd* himself that he was not returned upon the nisi prius panel, and that he answered to the name of *Richard Geater* a person returned on the panel, we had made

Barnes 453.
S. C.

satisfaction of Mr. J. *Abney*, who tried the cause, that the arrest and promise were within the jurisdiction of the Palace Court. 1 *Sid.* 30. If a judgment be irregular or erroneous, to forbear to sue out execution is a good consideration to support an assumpsit, 2 *Rel. Rep.* 495; *Yelo.* 25; 1 *Ventr.* 120; 2 *Lev.* 33; 1 *Lev.* 257; 1 *Sid.* 392; Sir *T. Raym.* 511; *Poph.* 183; 1 *Sid.* 89; 1 *Saund.* 229; and 2 *Ld. Kaym.* 795.

The Court inclined to think that if the party were under an illegal arrest or imprisonment the promise was not good (1); but the question was whether as this was after a verdict it did not now sufficiently appear that the writ duly issued below (2), and consequently that

the suit arose within the jurisdiction; and that this case greatly differed from writs of error on judgments in the inferior court where nothing shall be intended. But they ordered it to be spoken to again; and afterwards the plaintiff had judgment." M. S. *Abney* J.

(a) But it has since been holden that if it appear on the trial that the trespass was committed after notice, and the jury give less than 40s. damages, the Judge is bound under the Statute 8 & 9 W. 3. c. 11. s. 4 to certify that the trespass was wilful and malicious, in order to entitle the plaintiff to his full costs. *Dunmerton v. Jarvis*, 8 M. Geo. 3. C. B.; and *Reynold v. Edwards*, 6 D. & E. 11.

(1) So a promise to pay, in consideration of forbearing to sue on a void security, is void, *Lloyd v. Lee*, *Str.* 94; and so is a promise to revive a security which is void in its creation, *Cockbatt v. Bennett*, 2 D. & E. 763. — See also *Tubby v. Windham*, *Cro. Elix.* 206. But in *Bull v. Steward*, 1 *Wils.* 255, in an action for an escape on mesne process out of an inferior court against the bailiff, it was holden that the defendant could not take advantage of any error in the process below, of which the defendant below might have availed himself. And in *Dooly v. Donnelly* and another, 8 D. & E. 127, in an action on the case for refusing a debtor taking upon mesne process sued out of the Palace Court, it was decided that it was not a sufficient ground to arrest the judgment, that it was not alleged that the cause of action in the inferior court arose within the jurisdiction, or that it was not alleged that the party below did not appear at the return of the writ. — See however 1 *Rel. Abr.* 809. (F). pl. 3; and 2 *Mod.* 197.

(2) It was expressly stated in the declaration that the writ duly issued &c.

the nisi (a) for a new trial, and a rule against *Shepherd* to shew cause why an attachment (b) should not go against him, he knew that he was not returned and yet suffered himself to be sworn on the jury, and as it looked like a trick in him to order to set aside the verdict if it should be given against his friend.

1744.

NORMAN
against
BRAMONT.

And now *Prime* Serjt. shewed cause against the rule; and *Leeds* Serjt. shewed cause for *Shepherd*.

Prime Serjt. insisted that the Court could take no notice of any thing but what appeared on the record; and that as all appeared to be right on the record, the Court could not take notice of any thing that appeared in the affidavits. And he cited a case of *Belman v. Crowle* in *B. R.*, where the defendant paid 24*l.* 10*s.* in court, upon which a rule was obtained according to the course of that court that it should be struck out of the declaration, but it seems it is never struck out: but the rule is produced at the trial, and then if the jury do not award more damages for the plaintiff than the money which is paid in, the verdict is always given for the defendant: but if the jury are of opinion to find more, they only give a verdict for the overplus. But in that case though the plaintiff had paid the money out of court, yet the rule not being produced at the trial the jury gave a verdict for the plaintiff for 24*l.* 6*d.* in which the 24*l.* 10*s.* was agreed to be included:

Prime said that upon a motion in *B. R.* for the defendant to order that the plaintiff should refund the 24*l.* 10*s.* or that the verdict might be amended, the Court said they could not take it out of the record, and therefore gave the defendant no relief. He insisted likewise that this objection was only matter of challenge and could not be taken advantage of after the verdict; and also that this was cured by the statute 32 *Hen.* 6. 30. *f.* 1. (c). And as it appeared that this was not a challenge against evidence, but plainly to the satisfaction of the Court, he hoped that the Court would not strain a point to set aside this verdict.

On *Wednesday*, October 14th, in the second term.

In the case of *Watts v. Brains*, 11 *Mod.* 779 several of the jury were indicted for misconduct. Which enacts that "if any issue be tried by the oath of twelve or more

indifferent men, in any of the King's courts of record, then the justice or justices by whom judgment thereof ought to be given shall proceed and give judgment in the same," notwithstanding any mispleading, &c.

Leeds

and he cleared himself from any imputation of what he did by design; so the rule was discharged him.

Booth Serjt. for the rule insisted that the statute did not at all affect this case; and relied very much on statute 3 Geo. 2. c. 25. (a), which says that two who are returned shall be sworn, and that they cause. And he cited the case of *Fines v. North*, 302. Mich. 8 Car. 1. where upon error from B. C., the error assigned was that but 23 were returned, and the habeas corpora was awarded 23 and one *Lambert*, and eleven and *Lambert* were found for the plaintiff; and the whole Court held it was ill and not helped by any statute, because one who was not returned by the sheriff, and they judgment.

We were all of opinion that the statute 32 H. 8. extend to the present case, nor to any mistake in process; for if it did, there had been no occasion for the statute 21. Jac. 1. c. 13. (b); the words of

(a) The eighth section directs sheriffs &c to annex to the writ facias a panel of not less than 48 or more than 72 jurors, containing their christian and surnames, additions and places of abode &c. Then the sixth section directs that

in the panel, and they be the jury to try the

(b) The second section enacts that no judgment or reversal "by real facias habere error

wife shew that the present mistake was such an one as ^{1744.}
not proper to be remedied.

NORMAN
against
BRAMONT.

We were of opinion likewise that this could be no cause of
challenge. It could not be a challenge to the array, for there
no objection to the array; nor to the poll, for there was
objection to *Richard Geater* the person returned. But this
an extrinsic objection, not appearing on the face of the
. A challenge to a jurymen supposes him capable of
sitting on the jury if the objection be answered: but *Richard*
Ward was no jurymen at all. And as to the matter not
bearing on the record, we said that in cases of this sort
the objection could not appear on the record we always
sisted of affidavits; as in respect to a misbehaviour of
of the jury, or any declaration made by any of them (a)
either before or after the verdict to shew that a jurymen was
partial. And we thought that the statute 21 Jac. I. c. 13.
3 Geo. 2. c. 25. very much strengthened the plaintiff's
petition.

My brother *Abney* said that *Blackmore's* case, 8 Co. 156.
only shewed that this was a mistake not amendable even
after verdict.

And I cited the case of *Hassett v. Payne*, Cro. Eliz. 256.
33 & 34 Eliz. B. R. where on an attainder it appeared that
George Ellinger was returned on the venire, but one
Henry Ellinger was named in the habeas corpora and returned
that name and sworn on the jury; and it was holden by
whole Court that no attainder would lie, because there was
no verdict, the trial being but by eleven.

We were therefore all of opinion that the rule ought to
be made absolute for setting aside the verdict, but we had a

return upon any of the said writs,
upon examination it be proved to be
the man that was meant to be return-
ed by reason that there is no return
any of the said writs, so as a panel
of names of jurors be returned and
read to the said writ," &c.
But the Court will not now receive

the affidavit of a juror respecting the
misconduct of the jurymen, *Vase v.*
Delaval, 1 D & E. 11; though for-
merly such affidavits were received,
Parr v. Seames, Barnes 438; and
Phillips v. Fowler, ib. 441. the case
above alluded to.

doubt

1744. doubt about the costs. We thought it hard that either the plaintiff or the defendant should pay the costs, because neither of them was in any fault. We proposed that the costs should abide the event of the next trial: but the defendant would not consent to it, and we thought that we could not make such a rule unless both the parties consented. We desired that the case of *Phillips v. Fowler* (a), *E 9 Geo. 2.* in this court might be looked into, to see what the Court did in that case in respect to costs, where they set aside the verdict for a very great misbehaviour in the jury; and we found upon inquiry that the Court at first made a rule for setting aside the verdict upon the defendant's paying the costs, but that afterwards the Court made a rule that the jury, who had grossly misbehaved themselves, should pay the costs on both sides.

NORMAN
against
BEAMONT.

At last upon mature consideration we made the rule absolute for a new trial without costs on either side (b)."

—"N. My Brother *Burnett* said he thought that in this case even at common law there ought to have been a venire facias de novo, according to the old method of proceeding before these motions for new trials, and that in that case there would have been no costs; which was a further reason for our not directing any costs to be paid in the present case (c).

(a) *Com. Rep.* 525; and *Barnes* 441. where a verdict was set aside, because the jury had cast lots.

(b) In *Hale v. Coxe*, 1 *Str.* 642., where the Court set aside the verdict on

account of the misconduct of the jury-men, they ordered the costs to abide the event of the new trial

(c) See the next case *Wray v. Thorne*.

M 18 G. 2.

Friday,
Nov. 16th.

WRAY against THORN and HANCOCK.

The Court refused to set aside a verdict and grant a new trial, because one of the jurors was named *Henry* in the venire, the habeas

"THIS was an action of trespass quare clausum fregit &c. The defendant justified under a right of way; and the plaintiff replied extra viam, on which the issue was joined, and a view had, and a verdict for the plaintiff, damages 1*l.*; and it was not pretended that it was a verdict against evidence.

corpora, and the possea, his real christian name being *Harry*. *Barnes* 454. & C. But

Henry Luppincott of *Alwerdiscot* Esq. was returned on the writ by the name of *Henry*, and he is so named on the eas corpora, the panel, and the postea, (there being a *5*); and he was one of the viewers. But an affidavit was deposed of *John Thorn* and *Lewis Wise*, in which *Thorn* swore that his right christian name was *Hurry*; and *Wise* that had taken a copy of the register, by which it appears that *was* baptized by the name of *Harry*.

1744-

WRAY
against
THOMAS.

A motion had been made (a) by *Huffey* Serjt. to set aside the verdict; and he cited *Cro. Eliz.* 222. *Fermor v. Dorrington*; *Cro. Jac.* 116. *Blunt and Farley v. Sneddon*; *Cro. Car.* 2. *Downs v. Winterflood*; and 5 *Co.* 42. *The Countess of Sandwich's case*. We were inclined to make it good if possible, and made a rule nisi that the matter might be thoroughly shewn to and considered. And now *Belfield* Serjt. shewed the writ against the rule.

I gave my opinion in the following manner;

This question can come only before a court for judgment one of these four ways;

By motion in arrest of judgment;

By motion for an amendment;

By motion for a new trial in this court; or

By writ of error in a superior court.

In order that I may be understood, I will in the first place shew the present case. In the next place I will mention all the cases that I can find that seem to bear any resemblance to this. And in the last place I will give you my opinion on the present question.

I then stated the case as before, and then proceeded to mention the cases in the books. The first case that I cited was *Cro. Eliz.* 57. *Displyn v. Spratt*, P. 29 *Eliz. B. R.* which was thus; *Thomas Baker* of *D.* was returned on the writ, in the distringas he was called *Thomas Carter* of *D.*, and by that name sworn on the jury. A motion was made in arrest of judgment, and a case cited where *George*

(a) On Wednesday October 24th in the same term.

Thompson

In *Cro. Eliz.* 222. *Fermor v. Dorrington, P. R.* in an action for words, after verdi& judgment because *Taverner* was in the return to the venire in the distringas; and he attended and was named of *Turnor*. A case was cited in the 1 *Douby v. Willott*, where a juror was returned of *Gregory* in the venire and in the distringas of *George*, and he was sworn by that name, and was arrested. Another case was cited out of *quer*, where one *Mizael* was returned on the venire the distringas it was *Michael*; both these were one *Michael* was sworn on the jury, and judgment stayed for this reason. In the principal case it first doubted, because the variance was in the first of the reasons before given; but afterwards resolved judgment should be stayed.

In *Cro. Eliz.* 256. *Haffett v. Payne, M. 33 & R.* in an attaint it appeared that one *George* was in the return to the venire, and in the distringas he was *Gregory*, and so sworn; and held *per totam Curiam* the attaint would lie, because no verdi&, the trial lasted eleven. In *Cro. Eliz.* 258. *Cotton's case*, the same in an action for words it was *J. S. of Abbsfan* in the return to the venire, and in the distringas *J. S. of A* was ordered to be amended after a verdi&. And in a term between *Mortimer* and *Oger* it was *De Huf*

named *Robert Mawre*, and so he was named on the *postea*; and it was insisted that a stranger who was not returned was sworn on the jury: but, by the whole Court, if he appeared by examination that his right name was *Robert Mawre*, so that he was well returned on the *venire*, and that the same man was returned and sworn, the *postea* may be amended. It was held otherwise in several cases there cited of the Year-Books; but it was said in that case that by the law was that judgment should not be stayed, for these discontinuances were aided by the stat. 32 Hen. 8. c. 10. and 18 Eliz. c. 14. But it was there said that even if a juror be misnamed in the panel annexed to the *venire*, though he be rightly named in the subsequent process, it is not amendable, and that it was so held in *Codwell's case* (a). *M. 35 & 36 Eliz. B. R.* It appeared in that case on examination that it was the same man who was returned on the *venire*, and that his right name was *Robert Mawre*; and for the reasons aforesaid by the opinion of the whole Court the *postea* was amended, and judgment given.

1744.
WRAY
against
THORNTON.

In *Danv. Abr.* tit. "Amendment," p. 330, is the case of *igo v. Payne*, 39 Eliz. B. R. where *Tippett* the true name was returned on the *venire*, but in the *habeas corpora* and *bringas* he was named *Typper*; yet if he be sworn and try the issue by his right name, it shall be amended; and said that the same was adjudged in *Marshall's case*, 40 Eliz. B. R., and in the case of *Arundel v. Blanchard*, Mich. 13 Jac. But in the case of *Floyd v. Bethell*, T. 13 Jac. 1. B. R. are also cited, in the *distringas* the juror was *Ap Pell* and in the *return* he was named *Ap Bell* was sworn, and said that it could not be amended by the Court after the death of the sheriff; for it cannot be amended to be the same man, for they are different names in the *return* where this trial was; but said that, if the sheriff who made the return had been living, he might have amended it. Several more cases are there cited; and in p. 331. where a mistake is in the surname; but if right in the return to the *venire*, the Court would amend it. In *Crg. Jac.* 116. a *Jac.* 1. B. R. in error from a judgment in B. R. the juror assigned was the juror was named *Constantinus* in the *return* to the *venire* and in the *distringas*, but he was returned

(a) 5 Co. 41. b. and 43. a.

But the statute 21 Jac. 1. c. 13. has put it
beyond all doubt in respect to surnames. The ver-
dict shall be stayed or arrested after a ver-
dict if any of the jury who tried the issue is misnamed
in the return or addition in any of the jury process,
it is thereupon, so as upon examination it ap-
pears that the person who was meant to be returned.”
This settled the point as to surnames, but has le-
ft to be settled as to christian names as it was before. Nor do
such mistakes are remedied by any of the subse-

But even as to christian names the cases are
divided and after this statute. In the cases al-
ready cited it seems to be held that mistakes in the christian na-
mes are not fatal. But in *Cadwell's* case, 35 & 36
Ch. 42. B. and 42. C. and which is called the
case of *Parker*, in *Crit. Cas.* 203., in an appeal
between *Cadwell* and *Parker* verdict for the
defendant in arrest of judgment that there was a
mistake in the return of the venire and the distri-
nging as to the name of a jurymen. In the return
he was named *Fabius Chak*, in the distringas
Parker, by which name he was sworn; there j
was a verdict, because he was misnamed in the panel.
But it was held that if he had been rightly na-
med as to the venire, and wrong in the othe-
wise, it would have been amended on examination.

ough this was upon a writ of error. T. 42 El. B. R. 1744.
 wo. Abr. tit. "Amendment." p. 330.

WRAY
 against
 THOMAS.

These cases were before the statute. Since the statute, in case of *Rowe and Bond v. Devys*, M. 15 Car. 2. B. R. Cro. Car. 563; Sir W. Jon. 448; and *Danvers* 330; in return to the venire a juryman was named *Samuel*, and in the distringas, but in the panel annexed he was called *aniel*, and sworn by that name as appears by the record, I gave a verdict for the plaintiff; though this was not in the stat. 21 Jac. 1., yet it appearing upon the examination of the juror himself that he was the person returned, and that his right name was *Samuel*, and that there was no other person of that name in the parish, and by the examination of the sheriff and his clerk that it was the misdirection of the clerk, who, though he had the distringas before him, wrote *Daniel* for *Samuel* in the panel; and the juror likewise swearing that, there being a great noise in the court when he was sworn, he answered supposing himself to be called by his right name of *Samuel*; the record was ordered to be amended, and the judgment was not stayed; and the Court held, though the statute 21 Jac. 1. extended only to surnames, and did not therefore help the present case, yet that this was amendable by the common law, and by the statute 8 Hen. 6. c. 12. as being only a misprision of the clerk.

There is indeed a case in *Cro. Car.* 203., between *Downs* and *Winterflood*, M. 6 Car. 2. where this seems to be doubted: that was in an attainder, and no judgment appears to be given. The case was thus; one of the jurors was returned by the name of *Alexander Prescot*; in the return, which in the nature of a distringas, he was called *Alexandrus Prescot*, and was sworn by that name; the verdict of the petit jury was affirmed, and this was moved in arrest of judgment: the Court held clearly that this was not aided by the statute 21 Jac. 1. c. 13. But as the cases cited to arrest the judgment were where the mistake was in the return to the venire, and as it appeared there that the return to the writ process was right, *Alexander* being the true name, and appearing that he was the juror who was intended to be returned and sworn, the Court seemed rather inclined to think

1744. think that the second process might be amended, but adjourned the consideration thereof.

WRAY
against
THORN.

These are the most considerable cases that I can find, which seem to bear any resemblance to the present.

And now I shall come to the consideration of the present case. It was truly said by the counsel for the plaintiff that we ought not to go out of the record (unless in respect to such matters as throw an imputation on the jury and cannot appear on the record itself, concerning which I have been more particular in the case of *Norman v. Beaumont* (a) in this term, so I need not repeat what I there said); and they cited the case of *Arundel v. Arundel*, Cro. Jac. 12; and *Dyer* 163. b. pl. 56. which are full to this purpose.

Now the record here being right, and no variances appearing thereupon, there is no occasion for any amendment, nor can the judgment be reversed on a writ of error, and for the same reason the judgment cannot be arrested: whereas in all the cases cited the variance appeared on the record; and therefore unless the record were amended, the judgment ought to have been arrested, or it would have been reversed on a writ of error. The only question therefore in every one of them was whether the record should be amended.

So all the cases were very different from the present, in which there can be but one question, whether by reason of a matter not appearing on record but laid before the Court by affidavit we shall set aside the verdict and grant a new trial. And I think it would be very unjust to grant a new trial in the present case, since there is no objection to the verdict itself, since the objection does not appear upon the record, and since it appears by the affidavit which makes out the objection that the jurymen who were sworn on the jury and tried the cause was the person who was summoned and returned and intended to be a juror in the cause, which is the very reason relied on in the statute 21 Jac. 1. c. 13. and in all the cases where amendments have been ordered.

(a) See the preceding case, *sup.* 484.

I did not lay much stress upon the answer which was given 1744-
 y the counsel for the plaintiff, that a man might have two
 bristian names, one at his baptism and another at his con-
 firmation; but for the reasons aforesaid I was of opinion
 that the rule ought to be discharged.

WRAY
 against
 THOMAS.

My Brothers *Abney* and *Burnett* were both of the same
 opinion. They thought that *Henry* and *Harry* might be
 taken to be one and the same name. That, as granting new
 names was merely in the discretion of the Court, they thought
 it was such a case that the Court ought not to set aside the
 verdict, since it was agreed to be a just verdict, and since
 no variance appeared on the record, and there was not any
 reputation upon any of the jury.

And Brother *Burnett* said that the only question in this
 case was, whether, when Courts always go as far as they
 can to support a verdict, we should in this case set aside a
 verdict contrary to justice and to the reason of all the cases
 that had been cited. He likewise cited *Arundel's* case, *Hob.*
14, where *Lifney* in the habeas corpora was made *Lifney* to
 agree with the venire, though the true name was *Lifney*, be-
 cause they found so like. He also cited some other cases
 where *Baskervill* and *Baskersfield* (a), *Stoke* and *Stokes*, *Haf-*
ting and *Hastings*, *Mac Kair* and *Kair*, had been holden to
 be the same name.

And *per Curiam*, the rule was discharged (b).

—— N. This case is very different from the case of
Herman v. Beaumont (c); for there a person was sworn upon
 the jury by mistake who was never summoned or returned
 in the room of one who was summoned and returned."

(a) Vid. 2 *Rel. Rep.* 168.

(b) In *R. v. Roberts*, 2 *Str.* 1214.
 On a trial at bar of a traverse to an in-
 dictment of lunacy, the Court ordered
 against the defendant's consent) the

christian name of one of the jurymen
 to be altered from *Henry* to *Harry* on
 his acknowledging that he was the
 person summoned.

(c) The preceding case, *sup.* 484.

1744-

M. 18 Geo. JOHN THOMAS *against* MARGARET CADWALLAD
 2. Satur- Administratrix of CHARLES CADWALLADER.
 day, Nov.
 24th.

In an action **C**OVENANT. The plaintiff declares upon an in-
 denture dated 10th of *February* 1720, whereby
 on a cove- plaintiff and one *Rebecca Thomas* since deceased demise
 nant against a lessee for *Charles Cadwallader* a messuage and tenement in *Bishop's C*
 not repair- with the stable mill garden and backside or yard thereto
 ing (the co- with the stable mill garden and backside or yard thereto
 venant ad- long (except as therein excepted) to hold the same fi
 ding "the long (except as therein excepted) to hold the same fi
 lessor allow- the 25th of *March* then next for twenty-one years un
 ing and as- the rent of 10*l*, a-year payable at *Michaelmas* and *Lady*
 signing tim- And the said *Charles* did thereby covenant for himself
 ber for the repairs") it executors administrators and assigns to and with the
 is necessary *John Thomas* his heirs and assigns that he the said *Charles*
 to aver that executors administrators and assigns should and would fi
 the lessor did allow and assign time to time and at all times during the said term uph
 timber &c. maintain repair and keep the said messuage and other
 demised buildings thereto belonging in good and suffici
 repair, and the same at the end or sooner determination
 the said term should and would surrender and yield up to
 said *John* and *Rebecca* their heirs and assigns in good and
 nantable order and repair, *he the said John his heirs*
assigns, finding allowing and assigning timber sufficient for
reparations during the said term to be cut and carried by the
Charles his executors administrators and assigns.

And the plaintiff sets forth that *Charles* entered by vir
 of the said indenture, and being possessed of the said
 mised premises died at *Ludlow* on the 22d of *April* 173
 and that administration of all his goods &c with his will
 annexed was afterwards duly granted to the defendant, w
 by virtue thereof entered upon the demised premises
 was possessed thereof until the end of the said term; t
 that at the end of the said term of twenty-one years
 for the space of five years then before the said messu
 and other the demised buildings thereto belonging w
 greatly ruinous and in decay and wanted necessary repa
 tions and amendments; and that the defendant duri
 her possession of the said messuage &c did not uphold mai
 tain repair and keep the same in good and sufficient repa

ne at the end of the said term surrender and yield and sufficient order and reparation, but at the end term left the same so in decay and wanting great as aforesaid; contrary to the form and effect of venant &c; and lays his damage at 100/. Defendant pleads that the plaintiff during the said term allow or assign timber sufficient for upholding maintaining or keeping the said messuage and other misad premises in good, and sufficient repair; to plaintiff demurs generally, and the defendant joins in this it came in judgment before the Court.

1744.

THOMAS
against
CADWAL-
LADER.

rit. for the plaintiff insisted on three things; the plea was too general; it only saying that the term did not find &c. at the finding of timber by the plaintiff was not precedent, but a mutual or reciprocal covenant; tently that the breach of it cannot be pleaded to ought on the covenant of the lessee. at if it could be insisted on by way of plea, yet est ought to have been pleaded.

ited the case of *Warren v. Afters*, Sir Tho. Jon. the lessor covenanted that the lessee should have it trees for repairing (a), *he making good the fences* and it was holden not to be a condition but a nant. That the word "paying" has been held nant and not a condition (b). And he cited a , reported in *Lucas* (c) 153, 189, and 222, where hat, if a man covenanted to pay money due on to a person, he assigning the judgment, on an

s not accurately stated. plaintiff demurred, and shewed for cause of trespass by a lessee that the defendant had not alledged, that ch the defendant plead- he had mended the fences and filled up who had leased to the the pits; but it was not allowed, be- d the trees with liberty cause it was not a condition but a co- them away, *he mending* venant for which the lessee had a re- ing up the pits, and that medy by action. ds granted the trees and (b) The case of Sir George Bicker- : defendant; and then *Staffe*, cited *ib.* r this liberty &c. The (c) 8 *Modern*.

K k

action

But in the case cited out of *Kelle* the words are of covenant ; and it is there said that if the w that the lessee should repair, *provided* the lessee timber for it, they would not have been consid- nant on the part of the lessor, but as a qualif covenant of the lessee; so that this case is rathe against the plaintiff.

He insisted likewise that if this were necessa by the plaintiff yet that the first act was to b lessee; for that he was to request the plaintiff t and that he ought likewise to shew that these pairs for which timber was necessary; for whi cited 1 *Roll. Abr.* 465. *pl.* 28.

Hayward Serjt. for the defendant did not m the plea was good, but said that the declaration that then it was immaterial whether the plea wer He said that these could not be considered as nants, for that the finding of timber was a coi dent, or the qualification of the lessee's covenan faciente and si ipse fuerit have exactly the sa and that if the words had been si ipse inveneri doubtedly been a condition precedent. Tha therefore is not assigned upon the covenant in t the covenant to repair is a qualified covenant, a and the breach is assigned of an absolute coven He cited the case of *Large v. Chesbire*, 1 *Vent Abr.* 414. and 2 *Dowdery* 220. title "Covenant"

so therefore insisted that the plaintiff ought to have set forth
his declaration that he was always ready to find and assign
timber, and that not having done so the declaration was
insufficient. 1744.

THOMAS
against
CADWAL-
LADER.

We were all of that opinion, and gave no opinion upon
the plea.

I thought that none of the cases, though in my opinion
they had gone too far already, came up to the present case;
that this finding of timber was a thing in its nature ne-
cessary to be done first, and therefore must be considered as a
condition of the lessee's covenant. When two covenants
in a deed have no relation to each other, I was clearly of opi-
nion that the non-performance of one could not be pleaded
in bar to an action brought for the breach of another covenant
in the same deed; and for this plain reason amongst others
that the damages sustained by the breach of one such covenant
may not be at all adequate to the damages sustained by the
breach of the other; and therefore I held that all the cases
were right where nothing more was determined. The case
of assigning the judgment is plainly different; for a man may
pay the money before the judgment is assigned. The case of
paying rent is also different, because a man may enjoy the
land, nay ought to enjoy it, before he pays rent. The case
of repairing the hedges and fences likewise stands on the same
reason; for there the wood must be cut down before the hedges
and ditches are mended. But a man cannot repair until the
timber is assigned him for such repairs. And the case in 1
7. Abr. 518, and that in 2 Durners 229, are strong authori-
ties for the defendant; for the word "provided", which was
thereholden to make a condition, is not so strong an expres-
sion as the words "finding and allowing," in the present case.
I expressed my dislike of those cases, though they are too
strong to be now over-ruled, where it is determined that the
breach of one covenant, though plainly relative to the other,
may not be pleaded in bar to an action brought for the breach
of the other, but the other party must be left to bring his
action for the breach of the other; as where there are two
covenants in a deed, the one for repairing and the other for
finding timber for the reparations; this notion plainly tending

1744. to make two actions instead of one, and to a circuit of action and multiplying actions, both which the law so much abhors. If therefore this were a new point, I should be inclined to be of opinion that, though where there are mutual covenants relative to one another in the same deed a plaintiff is not obliged in an action brought for the breach of them to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the nonperformance of the covenant to be performed on the part of the plaintiff: but this has been so often determined otherwise, that it is too late now to alter the law in this respect. But where words make a condition precedent or a qualification of a covenant, as the present case plainly is, all the cases agree that the plaintiff in his declaration must aver the performance of such condition or qualification.

THOMAS
against
CADWAL
LADER.

And my Brothers *Abney* and *Burnett* being both of the same opinion with me,

Judgment was given for the defendant (4)

(a) See *Mucklestone v. Thomas, E. Vernon, sup. 153*; &c; and the 12 Geo. 2. *sup. 146*; and *Acherley v.* there referred to.

M. 18 Geo. 2.

Saturday,
Nov. 24th.

JEFFRY HASSELL on the Demise of JOHN HODGKIN
against FRANCIS GOWTHWAITE.

A. by will
gave a
leasehold es-
tate to B.

his execu-
tors &c,

subject to a
rent-charge
to his wife
during her
widowhood,

is as follows.

with power

to the widow

to enter for

nonpay-

ment, and to

enjoy &c

until the arrears were satisfied; and after the widow's marriage or death he willed that she should pay the rent-charge to C. his executors administrators and assigns: the widow died, on which C. received the rent charge during his life, and then C. died, without paying of the rent-charge, appointing D. his executor; held, that D. had no right of entry for nonpayment of the rent-charge.

—If D had a right of entry, a demand would have been necessary. *Semb.*

—D. the executor is entitled to the rent-charge; *semb.*; and may distrain for it.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "This comes before the Court

upon a case made before my Brother *Abney* at the *Leet* for the county of *York* held on the 7th of *March 1743* the trial of an ejectment for a moiety of a mill; and the case is as follows.

Richard Didbury, being possessed of the premises in question under a lease for lives, by his will duly executed bequeathed

29th of *May* 1714 gave, amongst other things, to her-in-law *Francis Gowthwaite* the defendant, upon the
 the provisos and payments following, all his personal
 and all his copyhold estate which he purchased of Sir
 by Bart. to him and his heirs for ever, pursuant to a
 er by him made thereof. And he also gave to him
 tutors administrators and assigns (but subject also to
 owing payments and provisos) all the corn-mill kiln
 he purchased of Sir *A. Danby* with all its perquisites
 appurtenances; all which said personal estate copyhold
 d and mill and kiln with their appurtenances he the
Francis Gowthwaite his heirs and assigns, or his executors
 rators and assigns, according to the different tenures
 shall or may have and enjoy upon the following con-
 provisos and payments and no other; and amongst
 ther payments provisos and conditions there are the
 g clauses which are the only ones that are material in
 ent case, viz. that he shall pay to his (the testator's)
Elizabeth quarterly payments of 3*l.* 10*s.* per annum
 any deductions for and during her natural life, or until
 l marry again and no longer. And gave another 3*l.*
 r annum to be paid quarterly by four equal payments
 ife for the sole use of necessities and education of his
 r *Hannah* during her minority; and directed that these
 uities shall be charged out of the moiety of the said
 id that upon nonpayment thereof, or of any part
 contrary to the true intent of his will for more than
 e of twenty days after each intended payment it shall
 be lawful for his said wife in her own or her said daugh-
 e to enter upon and enjoy the said moiety of the said mill
 appurtenances, until such arrears with all reasonable
 be fully discharged and paid, and this when and as
 need shall require. And that his said daughter so
 she shall arrive at the full age of twenty-one years shall
 enter upon the quarterly payment of 3*l.* 10*s.* per
 and in case her said mother shall be then either dead
 ied again that she shall enter upon the other 3*l.* 10*s.*
 um which was payable to her said mother; which
 ts shall commence from and after the death of his
 e. And that in case his daughter shall die in her
 r and without lawful issue then living, his nephew
Thomas

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1744. *Thomas Hodgson* shall enter upon the said *rent-charge* belonging to his said daughter at what time his said daughter and without lawful issue should have arrived at the said full age of twenty-one years. And further that in case his said wife shall marry again or however after her death (his said daughter being also dead in her minority and without issue) then his will and mind is that his said brother-in-law *Francis Gouthwaite* his executors administrators and assigns shall pay also the quarterly payment of 3*l.* 10*s.* (as till then due to his said wife) to his said nephew *Thomas Hodgson* his executors administrators and assigns, always intending that in case any of the said three lives then in being relating to the said will shall happen to drop in the interim that his said daughter or her lawful issue or else the said *Thomas Hodgson* shall pay one moiety of the charge relating to the renewing of the said lease to his executor. He constituted his said brother-in-law *Francis Gouthwaite* sole executor of his said will; and afterwards the testator died so seized on the same day and year.

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Hannah the daughter in the lifetime of her mother died in her minority and without issue; and the said *Thomas Hodgson* the nephew at the time when the said daughter would have arrived at her age of twenty-one years entered on the said rent-charge of 3*l.* 10*s.* per annum so devised to the daughter, and received the same during his life.

Elizabeth, the widow, afterwards married again one *William Wood*, on whose marriage the said *Thomas Hodgson* became also entitled to the said other rent-charge of 3*l.* 10*s.* so devised to the said wife, which by the said will is devised to him his executors administrators and assigns as aforesaid, and was possessed thereof and received the same during his life.

The said *Thomas Hodgson* in his lifetime on the 14th of June 1739 made his will, and the said *John Hodgson* the lessor of the plaintiff sole executor, and then died; and because the said rent charge of 3*l.* 10*s.* so devised to the said *Elizabeth* the widow and after her decease or marriage to the said *Thomas Hodgson* his executors administrators and assigns as aforesaid was in arrear and unpaid to the said *John Hodgson* the

the lessor of the plaintiff as executor of the said *Thomas Hodgson*, the said *John Hodgson* brought his ejectment. And three points upon the trial were reserved for the opinion of this Court, 1744.

1st, Whether *John Hodgson* the lessor of the plaintiff had any right to enter for nonpayment of the said rent-charge by virtue of the said will.

2^{dly}, Whether a demand of the arrears of the rent-charge ought to have been made by him before the bringing of the ejectment.

3^{dly}, Whether the rent-charge determined on the death of the said *Thomas Hodgson*.

As to the 3^l. 10s. a-year given to the daughter, and given over to *Francis Hodgson*, the counsel for the plaintiff (a) did not insist on it, otherwise I should have thought that that wife (b), as to the right of *Thomas Hodgson*, (which is the third question,) might have admitted of a dispute, as well as the other; but as that is given up by the counsel for the plaintiff, I shall confine myself to the devise of the 3^l. 10s. given to the wife.

And if we should be of opinion as to either of the three questions against the lessor of the plaintiff, it will be just the same thing as if we were of opinion against him upon all of them; for if he had no right to the rent, or (if he had) had no right to enter for nonpayment, or (if both these points were with him) if a demand were necessary before bringing the action, as it is admitted that no demand was made, in either of these cases judgment must be for the defendant. And as we are all clearly of opinion against the plaintiff on the first question, we need not give any opinion on the other two: however, as they were fully spoken to by the counsel, I shall say a little upon them, but without giving any positive

(a) The case was argued on Tuesday the 6th of November 1744 by *Bastle* serjt. for the lessor of the plaintiff, and *Draper* Serjt. for the defendant.

(b) There seems to be a distinction between the two sums in the will; the 1st is given to the widow during her widowhood, and afterwards to the ne-

phew *T. Hodgson* his executors administrators and assigns; but with regard to the other, which is given to the daughter, the deviser merely said that "on her dying a minor and without issue his nephew *T. Hodgson* shall enter upon the said rent-charge belonging to his said daughter" &c.

1744. opinion, and shall begin with the last question first, as being
 a question on the right itself.

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And this may be divided into two questions,
 1st, Whether it was the intent of the testator that the rent-charge should determine on the death of *Thomas Hodgson*, or go to his executors &c.

2dly, Whether, if it were his intent, the devise can be so construed according to the rules of law; for if his intent be not consistent with the rules of law, it cannot take place.

1st, We are rather inclined to think that the testator intended that the rent-charge should continue as long as the estate out of which it issued, and that if that should last (as it did) after the death of *Thomas Hodgson*, the rent should go to his executors &c. For the rent is devised in the same words as the estate, each of them to the executors administrators and assigns of the first devisee. The observation made on the fourth (a) clause in the will will not hold, that it is plain thereby he intended that the estate should go to the heirs of *Francis Gowthwaite*, for the word "heirs" there is plainly satisfied by referring it to the devise of his copyhold; but the will is devised in express words to *Francis Gowthwaite* his executors administrators and assigns. In the next place it is plain that he did not intend that the rent should determine on his daughter's death, but that her issue should have it; and it seems as if he intended that *Thomas Hodgson* should have as good an interest in it as his daughter, since he directed him to pay as great a share of the renewal money as his daughter or her issue were to pay. Supposing it therefore to be his intent that the rent-charge should go to the executors &c of *Thomas Hodgson*.

2dly, Let us see whether by the rules of law the words of the devise will bear such a construction. Now all the cases cited to the contrary were before the statutes 29 Car. 2. c. 3. f. 12. and 14 Geo. 2. c. 20. f. 9. And though before those statutes it might probably have been very difficult to reconcile such a devise with the rules of law, yet we think that

(a) The first clause in the will as abstracted in this case.

since

statutes it may have such a construction as is by the plaintiff. The material cases cited to were *Salter v. Boteler*, Moor 664; a rent was of his executors administrators and assigns during another; the grantee died intestate living the it was held that the administrator could not be want of this rent, but that it determined on the grantee; but it was said that the grantee might in his lifetime, and that if it had been granted heirs the heir would have been a special occupant. The doctrine is laid down in 2 *Roll. Abr.* 151. it is there said that the reason is because a freehold goes to the executor or administrator. But the cases are held as to lands: *ib.* G. 2. For it is said to grant lands to one of his executors during the life, if the grantee die his executor shall be a special occupant, though it be a freehold. And the same is said in *1 Occipant*, p. 71. The law therefore before the statutes seems to be clear that there could be no general occupant of a rent; and for this reason, because there can be no general occupant of a rent according to the rule laid down in *Co.* there can be no general occupant of any thing but a freehold. But the books seem to agree that the heir is a special occupant of a rent, though not properly a special occupant, but rather a person who takes by the force of the grant, and therefore may most properly be called a special grantee or assignee (a). And the books, *1 Occipant*, say that an executor or administrator cannot be a special occupant of a rent granted per autre vie, because it is not a freehold, but there are some cases that I have already cited to the contrary (b). So that this was a doubtful point before the stat. 29 Car. 2. c. 3. and 14 Geo. 2. c. 20. the new seems to be removed by those statutes (c). In the statutes there are these words, *an estate or interest*, which extend to rents as well as lands.

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is. 387. b.
466.

under (sect. 12) it is en-
per autre vie shall be
not devised chargeable
he heir as assets by de-
shall come to him by

reason of a special occupancy; and if
there shall be no special occupant, they
shall go to the executors or administra-
tors of the grantee, and be assets in their
hands. By the latter, in case of in-
testacy the surplus is distributable as
personal estate.

And

1744. And as these statutes make executors and administrators capable of taking such estates, and direct in what manner they shall be applied and distributed, we think that since the statutes an executor or administrator may take as a special grantee of a rent, granted or devised to one and his executors and administrators (a). If therefore the intent of the devisor the present case was, as we think it was, that the rent should go to the executors or administrators of *Thomas Hodgson*, we are of opinion that there is now no objection in point of law why they may not take. We are therefore rather inclined to be of opinion that the lessor of the plaintiff, as executor of *Thomas Hodgson*, had a right to this rent: but we give no positive opinion upon it.

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Secondly, Nor do we give any positive opinion on the second question, whether a demand were necessary before the lessor could bring his ejectment; but we are rather inclined to think that it was. That a demand is necessary where a rent is reserved with a condition of re-entry, except in the case of the King, is solemnly determined in *Borough's case*, 4 Co. 73. And I know no case to the contrary, except *Kidwelly's case*, *Plowd.* 70. which is there denied to be law. But a man may certainly distrain for a rent before any demand; and the present is a sort of a mixed case. In *Lit.* 327. and *Co. Lit.* 203. such a condition of entry as the present seems to be compared to a distress. The words of *Litton* are, "he shall hold the land but in manner as for a distress;" and of Lord Coke, "that he shall take the profits in the nature of a distress." And this, I believe, occasioned the doubt at first in the case of *Jennet v. Cooles*, 1 Sid. 225; 1 *Saund.* 112; and 1 *Lev.* 170. whether an ejectment would be on such a power of re-entry: but it was at last determined

P (a) An estate per autre vie is not intailable within the statute de donis: the first taker may dispose of it by any conveyance during his life, *Norton v. Frecker*, 1 Atk. 544; *The Duke of Grafton v. Hammer*, 3 P. Wms. 266. n (e); *Deed Elake v. Luxton*, 6 D. & E. 289; and *Grey v. Mannock*, in Chanc. Trin. Vac. 1765, cited in 6 D. & E. 291.; or semb. by his will alone, *ib*. But if he do not dispose of it, the remainder-

man will take as a special occupant. *Norton v. Frecker*, 1 Atk. 544; and *Law v. Burrow*, 3 P. Wms. 267.—Where such an estate is limited to A. his heirs, executors and administrators, on A. dying intestate his heir is entitled as special occupant, and consequently may retain the title-deeds against the administrator, *Ashington v. Baker*, 4 D. & E. 229.

that

would (a), and the judgment given in the King's Bench affirmed in the Exchequer-Chamber. And the lessor in this case must admit that it will, otherwise it will afford no objection against him. As therefore this seems in the nature of a penalty to take the land from the owner, though for a time, and as an ejectment will lie against him as in this case as in the case of a re-entry, we think that a writ is necessary (b), but give no positive opinion, being equally of opinion,

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AGAINST
GOWTH
WAITER

on the first question, that the lessor had no right to enter on nonpayment of the rent. Such a condition is certainly taken strictly, and therefore is not to be carried farther than the devisor himself has carried it. Therefore it has been held that the lord upon an escheat cannot enter upon a writ of re-entry for nonpayment of rent. And it has always holden that powers to cut down trees, to make (c), or to do any thing that affects the land, must be taken strictly, and are not to be carried farther than the express

So is the case of *Sacheveril v. Day or Dale, Latch and Poph.* 193; and there are several other cases that press to the same purpose. So if a rent be granted to a man and his heirs, with a power for him to distrain during his life, his heirs cannot distrain, *Co. Lit.* 147. b. *Butt's* case, 7 b.

though the intent of the testator therefore in this case had been that *Thomas Hodgson* and his executors might enter and take the profits, yet as he has not expressed it, it cannot be said; for the condition of entry is plainly confined to the son and daughter: but we think likewise that his intent

d. *Hargr. Co. Lit.* 203. a. note also *Goodright d. Hare v. Magl.* 477. o&t. ed.—In the case of a landlord and tenant, where the landlord has a right to re-enter for nonpayment of rent, the legislature have removed from the difficulties attending entry at common law, by enabling him to recover an ejectment without any formal demand if there be sufficient distress on the demised premises. 4 Geo. 2. c. 28. s. 2. But if

there be a sufficient distress on the premises he cannot recover in ejectment without making a demand of the rent. *Doe d. Forster v. Wandless*, 7 D. & E. 117.

(c) See *Goodtitle d. Clarges v. Fennell*, Dougl. 564; *Pomery v. Partington*, 3 D. & E. 665; and *Doe d. Wyndham v. Halcombe*, 7 D. & E. 713; where most of the cases on this subject are collected; the result of them all is that the construction of the power is to be governed by the intention of the parties.

was

1744. was otherwise. A man's intent must be collected from his words; and when a man in one part of a will or grant makes use of certain words and omits them in another part, it has always been holden that his intent must be taken to be different. Besides, it is very probable that he might intend to give such a power to his wife and daughter and not to give it to a more distant relation, much less to his nephew's executor and administrators who might be no relations at all. But it was said that then it would be hard for *Thomas Hodgson* to pay half of the renewal if he had no other remedy to recover it but by action of debt. But this receives an answer; for it being plainly a rent-charge, and so expressly called in one part of the will, he may certainly distrain for it.

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WAITH.

As therefore we are of opinion that the executor of *Thomas Hodgson*, even taking it that he has a right to the rent, has no right of entry, the consequence is that *John Hodgson* who claims only as executor of *T. Hodgson* cannot recover in the ejectment; and therefore according to the rule, he must pay the defendant the costs of a nonsuit."

M. 18 G. 2.
Monday,
Nov. 26th.

EL. BLISSETT against J. HART.

In an action
by the
owner of an
antient ferry
against a
person who
erects a new
ferry near to
his, the
plaintiff
may declare
on his pos-
session; and
he need not
set forth in
his declara-
tion that he
keeps boats
and ferry-
men suffi-
cient to carry
passengers
over.
Bull. N. P.
76. 8. C.

[Hil. 17 Geo. 2. Rol. 762.]

THIS was an action on the case.

The first count alleged that "the plaintiff on the 2d of April 1740 before was and from thence hitherto hath been and still is seised of a certain antient ferry with the appurtenances commonly called *Bablock-Hithe Ferry* upon and over the river *Iffs* in the parishes of *North Moore* in the county of *Oxford* and *Appleton* in the county of *Berks* for conveying and carrying upon and over that river forwards and backwards all persons and the horses carriages and cattle of all persons having occasion for the same in boats kept by her (the plaintiff) there for that purpose, taking for the same certain reasonable freight or ferrivages to wit, for every person on foot one halfpenny, for every person on horseback one penny, for every horse one penny,

any, and for every carriage as follows, to wit, for every 1744-
 coach or chariot 2s. 6d., for every waggon 1s. and for every
 cart or chair 6d. and for every score of sheep 4d., and for
 all other cattle one halfpenny by the head, which said ferry **BLIMETT**
 has been in the form aforesaid from time whereof the me- **against**
 mory of man is not to the contrary [and no other ferry ever **HART.**
 was over the said river within the said parishes or either of
 them or near the said ferry of the said *Elizabeth*"]; Never-
 theless the defendant on &c unlawfully injuriously and wrong-
 fully erected and set up another ferry upon and over the
 said river near to the said ferry of the said *Elizabeth* at the
 parishes of *Fisfield* and *North Moore* in the said counties and
 continued the same &c, and at divers days and times &c,
 and unjustly carried and conveyed in his boat a great many
 persons and divers horses &c &c over the same river there
 forward and backward near to the plaintiff's said ferry; by
 reason whereof the plaintiff was obliged to let her said ferry
 at a much less rent than she did before, and had been de-
 prived of a great part of the profit and emolument of the
 said ferry, which of right belonged to her &c.

There were five other counts in the declaration. The
 second only differed from the first in these two particulars,
 in saying that the plaintiff kept boats for carrying persons
 carriages and cattle, "for certain reasonable freights and
 ferryages" without saying what the freights were, and in
 omitting the words between the parenthesis in the first count.

The third and fourth counts varied from the two first in
 this respect, that they charged the defendant with *continuing*
 another ferry unlawfully erected by the defendant near the
 plaintiff's ferry.

The fifth count was similar to the second, except that the
 ferry was stated to be over the *Thames*, instead of the *Isis*;
 and the sixth resembled the fifth with this difference only,
 that it was for *continuing* another ferry unlawfully set up by
 the defendant &c.

The defendant having pleaded the general issue, the cause
 was tried at the assizes at *Reading*, when a verdict was given
 for the plaintiff with one shilling damages.

A motion

fore should be clearly laid. That it was only plaintiff was *seised*, not that he was *seised in* no one can prescribe who has not an estate in 113; *Coryton v. Lithebye*, 2 *Saund.* 113; *Lu Co.* 86. *Aldred's case*, 9 *Co.* 5^r. *b. Eve v. Car.* 75; *Hurrison v. Peck, Latch.* 110; *Cowps Hob.* 39; *Scoble v. Skelton*, 2 *Mod.* 318; 2 *Sh Skin.* 36.

2dly, That there must be some valuable support such a toll, such as repairing &c. *Fa Owen* 67; 1 *Leon.* 142, 3; *Ball v. Collis*, 3 *B Vin. Abr.* title "*Prescription*", B. 259. But no is here set forth.

3dly, It ought to be a reasonable toll, *Savile* here the tolls were unreasonable; 2s. 6d. for chariot, and only 1s. for a waggon; and that tion here laid could not be supported, because no chariots or coaches before the time of Queen

4thly, That it should have been averred in tion that the plaintiff kept boats and ferrymen carry goods and passengers over the river; and of this averment was not aided by the verdict.

On the part of the plaintiff it was answered,

1st, That it was sufficient for the plaintiff his possession only without stating a seisin in fee an action against a wrong-doer for disturbing the

W. v. Flexman, 2 Ventr. 291. So in the case of erecting a new market, it is sufficient to allege that the plaintiff "hath and ought to have a market and toll" &c. *Tard v. Ford*, 2 Term. 172; *Robinson's Entr.* 51.

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against
Hart.

2dly, That it is not necessary to set forth any consideration. *Brownl. and Goldsb.* 177; and *Foster v. Holyman*, 1 Lev. 103.

3dly, That there was nothing unreasonable in the claim of tolls as set forth; and that the rates being stated after a *licet* it was not necessary to prove them as laid. *Stapleton v. Morfe*, Cro. Eliz. 798. And with regard to coaches being of modern invention, it was sufficient to say that the facts constituting the prescription are found by the jury (a).

4thly, That in fact it was sufficiently averred that the plaintiff kept boats &c, "boats kept by her (the plaintiff) for that purpose;" that if not, the want of such an averment, if necessary, was aided by the verdict; and that in such a case as this it was not even necessary to make such an averment at all. That this was not like the case of a mere private right. That though such an averment was to be found in some of the precedents of declarations of this kind, the greater number of precedents was without it. *Rast.* 9. b; 1 *Brown's Entr.* 68, 9; *Robins. Entr.* 51; *Hearn* 101, 190; 1 *Hen.* 4. 82, 83; pl. 28; *Harbin v. Green*, Hob. 189; *Parker v. Sterne* v. Edden, 1 *Ld. Raym.* 384; *Buxton v. Bateman*, Sid. 88; 203; 1 *Keb.* 386; 457; *Hall v. Wiseman*, Dyer 17. a. and *Stedman v. Hay*, Com. Rep. 366. And that the defendant might indict the plaintiff for not keeping a sufficient number of boats &c, this being a right of a public nature, or he might bring an action against him for damages if he had sustained any particular injury, 2 *Brownl. & Goldsb.* 180; *Payne v. Partridge*, Salk. 12; and *Carth.* 191.

The Court over-ruled all the objections but the last on the first argument. The second argument was directed for the single point only, whether it were necessary to aver in the declaration that the plaintiff kept boats and ferrymen sufficient to carry goods and passengers over the river; and on the second argument this objection was also over-ruled.

(a) *Vid. Chibberley v. Lethbridge*, 11 Geo. 2. sup. 72, 73.

1744. The Court therefore discharged the rule for arresting the judgment.

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against
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Judgment for the plaintiff. (a).

(a) The reasons given by the Court for the opinion they entertained do not appear in Lord Chief Justice Willes's papers: but the following note is taken from Mr J. Abney's note book.

"By the Court. A ferry is publici juris. It is a franchise that no one can erect without a licence from the crown: and when one is erected, another cannot be erected without an *ad quod damnum*. If a second is erected without a licence, the crown has a remedy by a *quo warranto*, and the former grantee has a remedy by action (1). But what profits it yielded, and what repair it was in were proper for the consideration of the jury to found their damages upon. The county cannot change a bridge or highway from one place to another 6 *Mod.* 307; 2 *Inst.* 701. The franchise is the ground of

the action. *Bra. Abr.* "Action on the Case;" *pl.* 14; 42; 57. In case of erecting a new market or ferry to my nuisance, I may have an assize of nuisance or an action on the case. If the ferry be not well repaired, it is popular, and in nature of a highway (2), and no action lies without special damage by reason of the infinity of suits: but it is to be reformed by presentment or information at the suit of the crown. This differs from the cases of mills, bakehouses, &c. which are grounded on customs and of a private nature; and this declaration is good without an averment of the sufficiency of the ferry.—And the plaintiff had judgment.

N. B. The Court rather inclined to conceive that, if the averment had been necessary, the verdict had not cured it."—MS. *Abney J.*

(1) But the owner of a ferry from A. to B. cannot prevent persons going in the boats of any other person from A. directly to C., though C. lie near to B., provided it be not done fraudulently and as a pretence for avoiding the regular ferry. *Tripp v. Frank*, 4 D & E, 666.

(2) Vid. *Bra. Abr.* tit. "Action on the Case," *pl.* 93.—But in the case of a county bridge, no action can be maintained by an individual against the inhabitants of a county, though he sustain a particular injury in consequence of the bridge being out of repair. *Russell v. The Men of Devon*, 2 D & E, 667; *Faulk.* 340.

M. 18 G. 2. NATHANIEL SIMPSON against CHIVERTON HARTOP.
Wednesday,
Nov. 28th.

[Hil. 16 Geo. 2. Rol. 1260.]

THE opinion of the Court was delivered, as follows, by
Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises.

But if they be not in actual use, and if there be no other sufficient distress on the premises, then they may be distrained for rent.

The

Willes, Lord Chief Justice. "Trover. This comes before the Court on a special verdict found at the *Leicester* assizes, held at *Leicester* on the 3d of August 1743.

The plaintiff declared against the defendant for that on the 30th of *October* 1741 he was possessed of one frame for the knitting weaving and making of stockings, value 20*l.* as of his own proper goods, and being so possessed he lost the same, and that afterwards to wit on the 18th of *August* 1742 it came to the hands of the defendant, who knowing the same to be the goods of the plaintiff afterwards to wit on the 19th day of the same month of *August* converted the same to his own use; damage 30*l.*

1744.

SIMPSON
against
HARTOFF.

The defendant pleads not guilty; and the jury find that the plaintiff on the 27th of *March* 1741 was possessed of one frame for knitting weaving and making stockings, value 8*l.*, his own proper goods. That upon that day he let the said frame to *John Armstrong* at the weekly rent of 9*d.*, and so from week to week as long as they the said *Nathaniel Simpson* (the plaintiff) and *John Armstrong* should please; by virtue of which letting the said *John Armstrong* was possessed of the said frame at the said rent until the time after mentioned, when the same was seized as a distress for rent by the defendant. That the said *John Armstrong* is by trade a stocking-weaver, and used the said stocking frame as an instrument of his trade, and continued the use thereof, and his apprentice was using the said stocking-frame at the time therein after mentioned, when the same was seized by the defendant as a distress for rent. That the said *John Armstrong* held of the defendant a certain messuage and tenement in the parish of *Woodhouse* and county of *Leicester* by virtue of a lease to him of the said *John Armstrong* thereof granted by the defendant under the yearly rent of 35*l.* for a term of years not yet expired, and was in the actual possession of the same when the said stocking-frame was distrained for rent by the defendant. That on the 19th of *December* 1751 *John Armstrong* was indebted to the defendant in 53*l.* for arrears of rent of the said messuage and tenement; and that the said stocking-frame was then upon the said messuage in the possession of the said *John Armstrong*, and that there were not goods or chattels by law distrainable for rent in the said messuage without the said stocking-frame sufficient to satisfy the said rent so in arrear at the time when the said stocking-frame was seized as a distress for the said rent. That on the said 19th of *December* the

L 1

defendant

1744 defendant entered in the said messuage and tenement and there seized the said stocking-frame on the said messes as a distress for the said rent so in arrear, as the said John Armstrong's apprentice was then weaving a stocking on the same frame. And that the defendant (though of quality) hath refused to deliver the said stocking-frame said plaintiff, and continues to detain the same. The verdict concludes, as usual, by submitting the matter to the opinion of the Court whether the said stocking-frame is distrainable for the said arrears of rent or not; and the Court should be of opinion that it was not, they award damages of the plaintiff at 8*l.* &c.

Upon this special verdict three questions (a) arise,

First. Whether a stocking-frame has any privilege at being an instrument of trade; or whether it be generally distrainable for rent as other goods are, even though there be sufficient distress besides.

Secondly. Though it may be so far privileged as not to be distrainable if there be no other goods sufficient, yet whether or not it may not be distrained if there be not sufficient distress besides.

Thirdly. Though it be distrainable either in the one or the other when it is not in actual use, yet whether or not it has not a particular privilege by being actually in use at the time of the distress, as the present case is.

I shall but touch upon the two first questions, because they are not the present case; but yet it may be proper to consider them a little, to introduce the third, which is the very new question.

There are five sorts of things which at commonlaw were not distrainable;

1st. Things annexed to the freehold.

2^d. Things delivered to a person exercising a public trade to be carried wrought worked up or managed in the way of his trade or employ.

(a) The case was twice argued; on Michaelmas February 6th 1743, 4. and on Trinity May 31st, 1744, by *Prime* King's Serjt. and *Burke* Serjt. for the plaintiff, and by *Skinner* and *Wright* King's Serjts. for the defendant.

1744.

3d, Cocks or sheaves of corn.

4th, Beasts of the plough and instruments of husbandry.

5th, The instruments of a man's trade or possession.

The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides.

SIMPSON
against
HARTOFF.

The two last are only exempt *sub modo*, that is upon a supposition that there is sufficient distress besides.

Things annexed to the freehold (*a*) as furnaces, millstones, chimney-pieces, and the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow.

Things sent or delivered to a person exercising a trade, to be carried wrought or manufactured in the way of his trade, as a horse in a smith's shop (*b*); materials sent to a weaver, or cloth to a taylor to be made up, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are.

Cocks and sheaves of corn were not distrainable before the statute 2 W. & M. c. 5., (which was made in favour of landlords), because they could not be restored again in the same sight and condition that they were before upon a replevin, but must necessarily be damaged by being removed.

Beasts of the plough &c were not distrainable (*c*), in favor of husbandry (which is of so great advantage to the nation,) and likewise because a man should not be left quite destitute of getting a living for himself and his family. And the same reasons hold in the case of the instruments of a man's trade or profession.

But these two last are not privileged in case there is distress enough besides; otherwise they may be distrained.

These rules are laid down and fully explained in *Co. Lit.* 17. *a. b.* and many other books which are there cited; and

(a) Vid. *Niblet v. Smith*, 4 D. & E.

(b) Or brought into a common inn. See "*Distress*," pt 57. But a carriage or a livery stable is not privileged from distress for rent by the lessor. *Francis v. Wyatt*, 1 Bl. Rep. 483; 3 Burr. 1498.

(c) But they may be distrained for nonpayment of the poor-rates, though there be no other goods sufficient to answer the demand, such a distress being in the nature of an execution. *Hutchins v. Chambers*, 1 Burr. 759.

could not be distrained any more than a net in a man's hand, 1744.
 in a horse on which a man is riding. So in *Moor* 214, *The*
Viscountess of Bindon's case, it is said that if a man be riding
 on a horse the horse cannot be distrained, but if he hath
 another horse on which he rides sometimes, this spare horse
 may be distrained. SIMPSON
against
HARTOFF.

I could cite many other cases to the same purpose, but I
 think that these are sufficient to support a point which has so
 strong a foundation in reason, especially since there is but one
 case which seems to look the contrary way, which is the
 case of *Webb v. Bell*, 1 *Sid.* 440., where it was holden that
 two horses and the harness fastened to a cart laden with corn
 might be distrained for rent. But in the first place I am not
 clear that this case is law; and besides it is expressly said in
 that case that a horse upon which a man was riding cannot be
 distrained for rent; and therefore a quære is made whether
 if a man had been on the cart the whole had not been privi-
 leged, which is sufficient for the present purpose, it being
 found that the stocking-frame was to be in the actual use of
 a man at the time when it was distrained.

For these reasons, and upon the strength of these authorities,
 we are all of opinion that this stocking-frame, the apprentice
 being actually weaving a stocking upon it at the time when it
 was distrained, was not distrainable for rent, even though there
 were no other distress on the premises; and therefore judg-
 ment must be for the plaintiff (a)."

(a) This case was cited and relied of *Davies v. Powell*, *Hil.* 11 *Geo.* 2.
 upon by Mr. J. Buller in *Gorton v. Sup.* 46; and *Eaton v. Southby*, *Hil.* 12
Mich., 4 *D. & E.* 568.--See the cases *Geo.* 2-*sup.* 136.

HUNTER against FRENCH and Others.

H. 18 G. 2.
 Tuesday,
 Jan. 29th.

NOT being well, I did not go to *Westminster*,
 But my Brothers *Abney* and *Burnett* gave judgment in this
 case for the plaintiff, the point reserved being given up by
 the defendant.

An allega-
 tion in a de-
 claration
 (for a ma-
 licious pro-
 secution)
 that the
 plaintiff

by a jury of the said county &c was duly and in a lawful manner acquitted" is proved by
 the production of the record by which it appeared that the jury found the plaintiff not guilty,
 and upon that judgment was entered that the plaintiff should go thereof acquitted.

The

1744, 5. The case was spoken to on the 22d of *November* last by *Prime* Serjt. for the plaintiff, and *Boole* Serjt. for the defendant; and is as follows.

HUNTER
against
FRENCH.

It was an action on the case for a malicious prosecution; wherein the plaintiff in the usual form sets forth that the defendant caused him to be indicted for perjury; and that he falsely and maliciously caused the said indictment to be presented against the plaintiff, and such proceedings were thereupon had that afterwards to wit at the sessions of our lord the King of oyer and terminer held at the castle of *York* in and for the county of *York* on *Monday* the 18th day of *July* in the 17th year of his present Majesty before *Thomas Denish* Esq. one of the justices assigned to hold pleas before the King himself *Thomas Birch* Esq. one of his Majesty's serjeants at law and their associates &c the said *Thomas Hunter* (the plaintiff) by a jury of the said county of *York* was duly and in a lawful manner acquitted of the premises in the said indictment specified; Damage 500*l.* Verdict for the plaintiff for 200*l.*

And a case was reserved for the opinion of this Court upon this point, whether the record of acquittal produced in evidence proved the plaintiff's declaration as laid. The evidence produced was a copy of the record of acquittal, whereby it appeared that the jury found the present plaintiff not guilty, and that upon that verdict the judgment of the Court was entered that the present plaintiff should go thereof acquitted.

Boole Serjt. for the defendant objected that the acquittal is by the court and not by the jury; and it appears by the evidence that the plaintiff in the present case was so acquitted; and that therefore he ought to have set it forth that he was acquitted by the judgment of the Court and not that he was acquitted by the jury, as he has done. For that the jury only find a person guilty or not guilty of the fact, and then the Court passes the sentence, till which time the party cannot legally be said to be acquitted. He insisted that all the precedents are in this manner, that the party was acquitted by the Court, and not one that he was acquitted by the jury. And he cited *Stroud v. Lady Gerrard*; *Salk.* 8; *Wentworth v. Wentworth*; *Cro. Eliz.* 452; *Francis Throgmorton's* case;

1, *Cro. Eliz.* 563; and 2 *Hale's Hist. of the Pleas of the* 1744, 5.
 243, where it is said that there must not only be an
 acquittal by a verdict but a judgment thereupon quod eat fine
 ; for the bare verdict of his former acquittal is not a
 sufficient bar without a judgment pleaded also; and ditto
 5. [But, on looking into that, it plainly appears to relate
 to verdicts in civil actions. Vide 14 *Hen.* 7. c. 30. there
 ed]. He also cited 1 *Ld. Raym.* 376. *Saville v. Roberts*,
 where the record is set forth at large, and it is there said that
 the party debito modo secundum legem et consuetudines regni
 placet inde acquietatus fuit, prout patet per recordum &c;
 which shews that the same, as reported in *Salk.* 13., is mis-
 taken; for it is there said that the record was et fuit inde per
 veredictum juratorum acquietatus, which (he said) was the
 y book where any such entry could be found.

HUTTEN
 against
 FARMER,

Prime Serjt., on the other side, insisted that the entry was
 bad; that a man might be properly said to be acquitted by
 a jury, as he undoubtedly may be said to be convicted by the
 verdict; that the judgment was the necessary consequence,
 and could not be refused ex debito justitiæ in a criminal case
 when the party was acquitted by a jury, for that no new trial
 could be granted; which we agreed. If this were not so, he
 said that the words "by a jury of the said county of York"
 ought to be rejected, and then it would be well enough ac-
 cording to the precedent in *Lord Raymond*; and the evidence
 showed that he was duly acquitted by verdict and judgment
 of the court thereupon. And he cited 2 *Inst.* 385. on *Westm.*
 c. 12. *Co. Entr.* 25. *b. Thomps. Entr.* 43. pl. 64. *Winch's*
tr. 74. *Trem. P. C.* 286, 289. *Clift's Entr.* 29. *Herne's Plead*
. 2 Hawk. P. C. 199, 200. *Hale's Hist. P. C.* 1 vol. 560
 and 2 vol. 64, 300, 301, 2, 4, and 5; and *Cowell's Interpreter*.

My Brother *Abney* was of opinion that it was well enough;
 and that the words "by a jury &c" might be rejected.

My Brother *Burnett* thought that they could not be re-
 jected; but that a man might properly be said to be acquitted
 by the jury at least; that it is sufficient to say that a party is
 duly

1744. 5. duly and in a lawful manner acquitted by the jury (a). A
 he took notice where express malice is necessary to be prov
 in these actions, and where not; that where a person is a
 quitted by a jury malice need not be proved at first on t
 part of the plaintiff, but it is incumbent on the defendant
 shew on the other side that there was a probable cause (b)
 but that where the indictment is quashed, it is necessary t
 the plaintiff to prove express malice; and this distinction
 said would reconcile all the differences in respect to this matt

MURTER
 against
 FRANCE.

I was of opinion that the words "by a jury &c" could r
 be rejected; they appearing from what my Brother Burn
 said to be very material words. I doubted whether a m
 could properly be said in a legal sense to be acquitted
 the jury; as the jury do not acquit him of the crime, b
 only find him not guilty of the facts, and then the Cou
 acquits him of the crime. But I was clearly of opinion th
 the acquittal was sufficiently laid in the declaration; for
 thought that the words might fairly be construed in th
 manner, that he was duly acquitted by the jury and in
 lawful manner acquitted, and then it would be very well
 cording to the precedent in Lord *Raymond*; to which co
 struction my Brother *Burnett* agreed.

(a) In an action for a malicious prosecution the plaintiff must allege that the prosecution is determined. *Arundell v. Tregone*, *Yelo*. 117; *Lewis v. Farrel*, 1 *Str.* 114; *Fisher v. Bristow*, *Dougl.* 215. So in an action for a malicious commitment on a charge of felony. *Morgan v. Hughes*, 2 *Durnf & E.* 225. In such a case stating that the plaintiff was discharged from his imprisonment is not sufficient. *Ib.* So in actions for maliciously holding to bail *Parker v. Langley*, *Gilb. Cas. in Equ.* 163; 10 *Mod.* 145, 209—Entering a nolle prosequi by the Attorney General is not a termination of the prosecution so as to enable the party accused to bring an action for a malicious prosecution, because new process may still issue on the same indictment. *Goddard v. Smith*, 6 *Mod.* 261.

(b) Malice and the want of probable cause must both concur to support an

action for a malicious prosecution. Malice may be implied from the want of probable cause, but not e conversely. *ton v. Johnstone*, 1 *D. & E.* 345.—action will lie for a malicious prosecution, though the indictment be defective and cannot be supported in law. *J. v. Gwynne*, *Gilb. Cas. in Equ.* 201, 221; and 10 *Mod.* 217; *Chambers v. binson*, 2 *Str.* 691; and *Wicks v. French*, 4 *D. & E.* 247.—But no action can be maintained for a malicious prosecution before a court martial for an offence cognizable by that Court; nor for laying to bring an officer under arms to a court martial, it being a military offence. *Sutton v. Johnstone*, 1 *D. & E.* 493.—Nor can such an action be maintained against an officer in army for an improper exercise of power flagrante bello and out of kingdom. *Barrow v. Koppel*, 3 *N.* 314.

- Howe

However the matter was ordered to be spoken to again: 1744. 5. As I said before, upon its coming on this day, the counsel of the defendant declined speaking to it;

HUNTER
against
FRENCH.

So judgment for the plaintiff according to the rule."

W^m GOTT and MARY his Wife against HENRY ATKINSON Son and Heir of HENRY ATKINSON OTLEY Esq. deceased, WILLIAM VAVASOR, THOMAS MICKLETHWAYTE, and HENRY ATKINSON LEEDS, Devisees of certain Lands of the said HENRY ATKINSON.

H. 18 Geo 2.
Monday,
Feb. 4th.

DEBT. The plaintiff declares on a bond dated the 1st of November 1737, whereby Henry Atkinson deceased was bound to the plaintiff Mary when sole in 200l. and himself and his heirs; and he lays his damage at 10l.

A devisee of all the devisor's lands &c, in trust to sell and pay all the devisor's debts, &c cannot be sued under the Stat. 3 & 4 W. & M. c. 14.

he defendant Henry Atkinson (being an infant) by his guardian pleads riens per discent (a); and the plaintiffs pray judgment against him of assets cum acciderint.

he defendants William Vavasor and Henry Atkinson, two devisees, plead that the testator died seized of divers lands and tenements in the county of York to the value of 200l. and that in his life-time, on the 21st of August 1737, he made his will, and gave to the defendants William Vavasor, Thomas Micklethwayte and Henry Atkinson all his lands and tenements which he had any power to dispose of by his will &c and all his goods and chattels and other personal estate whatsoever upon this special trust and confidence, that in such convenient time after his death as to them should seem proper they should sell and dispose of such his messuages &c and also all his goods &c for as

Barnes 164.
S. C.

If the heir pay his ancestor's debts of the value of the land descended, he is discharged from the debts of the ancestor. *Buckley v. Ingale*, 1 Str. 665.—But he can-

not plead that he claims to retain a certain sum for money laid out in repairing the premises descended. *Shetlworth v. Neville*, 1 D. & E. 454.

much

with ~~Elizabeth~~ *Elizabeth* ~~Livingston~~, to whom he gave all
surplus money; and he gave his said trustees
out of the money so raised their charges and
execution of the said trust. That the said
died on the same day, and that at the time of
were divers other creditors of the intestate
bond as upon simple contract, besides the plai
at the time of suing out the original writ,
before or since, the said defendants are not
devisees of any lands &c of the said testator
upon the trusts and for the purposes aforesaid
which were devised to them all remain unsold
are ready to verify; wherefore &c.

The other defendant *Thomas Micklethwayte*
that he cannot deny the action of the plainti
bond is the deed of the testator, but that th
life-time made his will as aforesaid, and sets
as in the other plea, only omitting the devis
to his wife; and says that he never entered
&c devised to him and the other defendants i
totally refused to accept of the trust, and has
meddled therewith; and this he is ready to ve
fore he prays judgment whether he ought to l
the said debt by virtue of the said bond, exc
messuages &c so as aforesaid devised to
defendants.

the execution of the judgment for the debt and da- 1744, 5-
 on any other lands and tenements or in any other
 r than on the lands and tenements in the plea men-
 , and for that the lands and tenements so mentioned
 :vised are not particularly specified or described; nor
 they confessed or acknowledged any lands or tenements
 d whereof the devisor died seized in fee, nor in what
 or places, county, or counties, the same or any of
 lie.

GOTT
 against
 ATKINSON.

He said two defendants join in demurrer; and upon this
 error it came before the Court.

After Serjt. for the plaintiff insisted that this was not a
 to the action, because the bond is admitted. And for
 purpose he cited *Carth.* 353, 354, and 5 *Mod.* 119.
How v. Hesther. But these are quite to another purpose.
 insisted also that the lands and tenements confessed ought
 ve been particularly described, and where the same lay,
 the plaintiff might be informed how to take out execution
 st them. He said that this was also held to be necessary
 : case of an action against an heir; and that it was said in
 :venth section of the stat. 3 & 4 *W. & M. c.* 14., that
 devisees should be chargeable just in the same manner as
 heir. And he insisted that this case was plainly within
 2. of that statute, entitled "an act for relief of creditors
 st fraudulent devises;" the words being very general,
 t all wills &c shall be deemed and taken to be fraudulent
 void against the creditor or creditors of the devisor."

After Serjt. for the defendants insisted that this was a good
 n bar of the action, for that the defendants as devisees
 not liable to any such action at common law; and if
 fore they were not within the statute, no such action
 d lie against them. He said they were plainly not within
 statute; for taking it that they were within the words
 nent of the second clause, which he did not admit,
 were excepted out of it by the fourth section; the
 s of which are "that where there shall be any devise or
 ction &c of any lands &c for the raising or payment of
 real or just debt or debts, or any portion or portions sum
 or

paid and satisfied." He admitted that if the case fell within the scope of the statute, the objection that the lands &c particularly described would have been good; but he contended that the case was not within the statute.

I WAS rather inclined to be of opinion that the action would have been within the second section of the statute, if it had not been excepted, the words of the clause being general. But I was clearly of opinion that it was an exception; that therefore this action would not lie. It frequently happens that the plea is a good plea to the action, though the bond was admitted, it was not admissible, and the action lay upon it against these defendants, but it was not a good plea to the action.

As the exception is worded, if there had been no payment of any particular debt upon simple contract, it would have been a good devise even against the bond creditors; much more when the debt was paid, and the payment of all the testator's just debts, and the creditors among the rest. Though the law is in favor of the bond creditors, it is most equitable that all a man's just debts should be paid equally; and whenever there are equitable assets, Equity always distributes them equally among the creditors. But to let the plaintiffs prevail in this case, would be quite to overturn the intent of the devise for the benefit of the plaintiffs a preference over the rest of his creditors to the lands devised. And as to what was said by the learned counsel, that by this mean the plaintiffs would be with-

en often holden to be a good objection in such an brought against the heir.

1744, 5.

GOTT
against
ATRINGTON.

J. Abney, and Mr. J. Burnett, were of the same opinion.

judgment was given against the plaintiffs for these two ants; and the counsel for the plaintiffs did not choose er up any judgment against the defendant *Micklethwayte* his plea, but contented themselves with taking judgment against the infant heir cum assets acciderint."

VINIFRED JACKSON against THOMAS SHARP.

H. 18 Geo. 2.
Tuesday,
Feb. 5th.

ASE. The action is brought for a malicious prosecution (a); in which an indictment (b) is set forth in declaration found at the session ofoyer and terminer for ty of London held at the Old Bailey on the 14th of charging the y 16 Geo. 2.: but the plaintiff does not set forth the plaintiff with conspiring with defendant to defraud the defendant of an East India bond, the declaration stated that the bond bore interest "as therein is (not was) mentioned, and held good.

ment in hæc verba, but only says that the jurors by d indictment upon their oath did present; and then sets our *East India* bonds specified in the indictment; and alia) in setting forth the first bond faith with interest : same as therein WAS mentioned; and, in setting forth ond third and fourth faith with such interest for the IS therein also mentioned; and afterwards it is set forth ne *East India* Company having on the 21st day of June year 1729 given due and public notice in the London interest "as e for the payment and discharge of the first of the be- therein is (not was) mentioned, and held good. entioned bonds, such bond by virtue and according to nor of such notice ceased to carry any farther interest and after the 31st day of December then next ensuing; is set forth in the same manner in respect to the three bonds, only the notices and times ceasing of payment aid upon different days, but the word then next ensuing le use of in the same manner. And the plaintiff lays mage at 3000l.

ce *Hunter v. French*, sup 517 conspiracy to cheat and defraud the de-
was an indictment against the defendant.
and three other persons for a

A verdict

1st, That in setting forth the three last bonds should have said *was* and not *is*; both the bonds being of a time past.

2dly, That the words *then next* must relate *December* next after the indictment, and not *December* next after the notice; and if so, it varies from the indictment.

To support these objections *Prime Serjt.* intended to appear that the bonds did still subsist; and intended not to be said of them "as *is* therein mentioned" cited the case of *Dr. Drake* reported in *Salk.* 6 reports of *Lord Holt's* time 350, where upon a judgment was given for the defendant, because *was* was in the information and the word *was not* in that case is very different from the present, because it was an information for a libel, and it set forth that it did make a libel, in which libel were contained several matters *secundum tenorem sequentem*, intended to be the same as setting forth the libel in *hæc* formerly was thought necessary to be done, but it has been several times determined otherwise, and it is settled that it is not. He cited likewise *L. 1* where the demise being laid to be by a person in the name of his father, whose heir he was, though his father died at the time of bringing the ejectment, was held good. And the case of *Wanderburg &c v. Blake*, where

the Court were of opinion against the avowant; for as he says it was his freehold, it must be intended to be a freehold and in his own right. And the case of *Odell forester Cro. Jac. 254*, where upon a writ of error from judgment in *Durham* the writ of error was holden not to be good, because it recited a judgment before the Bishop and six Justices, whereas the judgment removed appeared to be before the Bishop and nine Justices, viz. one Sir *H. Linley* was not mentioned in the writ of error. He also cited the case of *Sherley v. Underhill*, where a writ of error was holden not to be good, (but was amended) because it recited the record between *George Sherley* Knight and Baronet and *Underhill*, whereas by the record it appeared that *Sherley* was a Baronet and not a Knight. And *Strange v. Greenhill*, 20. 166. where upon a demurrer in debt on a bond quantized was holden to be an impossible word in the declaration. In the case of *Buckson v. Hoskins*, *Salk. 52.*; but this is but an insensible case, and so far as it is to be understood is rather an authority against the defendant. And the case of *Thomas v. Ewer*, 2 *Lord Raym. 756*, where judgment upon a demurrer was given for the defendant in a scire facias brought upon a recognizance, because there was a material variance between the scire facias and the recognizance. And the same is reported likewise in *Salk. 660.*, where a writ of error was quashed between *Darby v. Anely*, because there was a material variance between the record recited in the writ of error and the record returned. And the case of *Chetley v. Anely*, *Salk. 659*, where the plaintiff declaring on a recognizance and not setting it forth right, on noli tuel record pleaded judgment was given for the defendant.

JACKSON
against
STRANGE.

but we were all clearly of another opinion, and thought that the cases cited by *Prime* were not at all parallel to the present

We thought that, speaking of a thing past which still is, it may very properly be said *was* and *is*, as in the case of a custom; and that therefore either of the words might be made use of in the present case. As to what was said, that it does not appear that this bond is still in being, it might be taken to exist at the time of the indictment found, and likewise the grand jury could not have found it; and that

is

1744, 5. is enough for the present purpose, the declaration in this respect being in the very words of the indictment.

JACKSON
against
SHARP.

And so is the declaration in the other places, where the objection is taken to the word *then*. And we were all of opinion that the word "then" must relate to the time of the notice, being the proximum antecedens; and that the objection would have been much stronger, if the word "then" had been omitted. The declaration in the present case does not set forth the indictment in hæc verba (a), nor secundum tenorem sequentem; so the case of the *Queen v. Drake* is in no wise parallel to this.

We therefore over-ruled the objections; and judgment was given for the plaintiff."

(a) In *R. v. May*, Dougl. 193. it was holden that the words (in an indictment for perjury committed on the trial of an indictment for an assault) "in manner and form following, that is to say," did not bind the party to recite the former indictment verbatim, nor render the omission of the word "despaired" fatal.

H. 18 Geo. 2.
Wednesday,
Feb. 6th.

JOHNSON against WARNER and Another.

A precept out of an inferior court "to attach or distrain" the goods of the defendant, to compel his appearance, is good.

TRESPASS for breaking and entering the plaintiff's house at *Bradley* in the county of *Derby*, and taking and carrying away divers goods and chattels belonging to the plaintiff.

The defendants pleaded not guilty to all the trespasses, except the breaking and entering the house and taking the goods; and as to that they pleaded two justifications, respecting two several parts of the goods specified in the declaration.

—The proceedings of an inferior court may be pleaded by "taliter processum est" &c in the case of officers of the court; and in the case of the party also. Semb.—If it be stated in a plea that a precept issued out of an inferior court, it will be taken that it was issued by the Judge of that court.

As to the breaking and entering of the house and taking some of the goods (specifying which), they pleaded that the Honor of *Tutbury* in the counties of *Stafford* and *Derby* was an immemorial honor and parcel of the Duchy of *Lancaster*; that at the Court Baron of the King of the Honor of *Tutbury* holden on the 18th of *January* 1742 before *W. Ward*, J. *Dean*, *D. Astle*, and *P. Warner*, suitors of the said Court one

W. Hall

1744, 5.

JOHN WARD
against
WARRER.

• *Hall* levied his plaint against the now plaintiff in a plea of
assumpsit on the case to the damage of *Hall* of 39s. 11d. for a
use of action arising within the jurisdiction of the said
Court; and thereupon such proceedings were had in the said Court
that afterwards at the Court Baron of the said Honor
holden on the 8th of *February* 1742 before *W. Ward &c &c*
Jors &c there issued out of the said Court a certain precept
writing directed to the two defendants bailiffs of the said
Court and ministers of the said Court, commanding them to
arrest OR *disfrain* the plaintiff by his goods and chattels
whithin the said Honor so that he might be and appear at the
next court on the 1st of *March* then next to answer the
said *Hall &c*; that the precept was delivered to the defendants
to be executed, by virtue whereof they entered the said
plaintiff being within the jurisdiction of the Court, and attached
him and carried away the said goods for the cause aforesaid;
but the defendants at the next court holden on the 1st of
March returned the said precept served and executed; and
that the plaintiff had not yet appeared to the said plaint in the
said Court.

And as to taking away the residue of the goods (mentioning
 on,) they justified under a similar precept directed to them,
 which was issued out of the hundred Court of *Appletree*
place at Sudbury before the Steward of that Court.

To this plea there was a general demurrer.

Belfield Serjt. for the plaintiff took several objections to
plea.

1. The second part of the justification under the precept in the hundred Court is bad, for that gives no answer to the taking of the house; and that part of the trespass being answered, there is a discontinuance, 1 *Roll. Rep.* 135. 146. 2. Both the precepts are bad, being in the disjunctive to "seize or distrain," and therefore uncertain and void. An attachment and distress are of a different nature; the former is the property of the goods, the latter does not. And an attachment does not lie in inferior courts. 1 *Bullstr. F. Tels.* 194; *Cro. Jac.* 255; 1 *Roll. Abr.* 780.

M m

3dly,

more than the jurisdiction.

6thly, It is not said by whom the process was issued, whether by the suitors or the steward.

Draper Serjt., in answer to the first objection, says, one breaking was alledged in the declaration, which was sufficient.

2dly, An attachment against the goods is in actions of trespass on the case; it is only a writ of replevin, and is in the nature of a summons. *31, 32 & 152, 3. Finch. 545, 6.* In the goods attached are forfeited and may be sold, but in the courts they cannot be sold. *Cro. Jac. 255.* It is said in the books that an attachment cannot issue in an inferior court, it is only meant that kind of attachment in which goods are forfeited and sold, or under which the goods are taken, or the profits of land distrained.

3dly, The process is always general: but it is not a writ of replevin, otherwise he is liable on the case on the stat. of *Marlbr. 52 Hen. 3.* in actions of trespass.

4thly, *Taliter processum est* is sufficient in all the courts, and perhaps also in the case of a writ of replevin. *1 Lord Raym. 50; 1 Fent. 369; 2 Lutw. 14; 3 Lev. 20; 3 Ash. 126; 2 Mod. 102, 195.* In all the proceedings in the inferior courts.

5thly, It appears that the house was bro-

nts. If it did not so appear, the objection arising from 1744, 5. want of a venue is cured by the stat. 4 & 5 An. c. 16. it being specially pointed out as a cause of demurrer. JOHNSON
against
WARNER.
thly, It appears that the precepts were issued out of the
ative courts, that is, the one by the suitors who are the
ges, and the other by the steward.

The Court overruled the objections (a), and gave
Judgment for the defendants (b).

The reasons given by the Court (b) See *Murkiss v. Soper*, M. 11
appear in the Lord Chief Jus- Geo. 2. sup. 30; and *Morje v. James*,
papers, but according to Mr. J. M. 12 Geo 2. sup 122.
y's note the Court agreed with
Sert. Draper in his answers to all
objections.

CHILDS against PROWSE.

H. 18 Geo. 2.
Monday,
Feb. 11th.

A MOTION was made to discharge the defendant out of custody, because he was not charged in execution within two terms after judgment, according to the rule of E. 8 G. 1. Bringing an
action on a
judgment
within two
terms is not
equivalent
to charging
the defend-
ant in exe-
cution with-
in two terms
according to
the rule
E. 8 G. 1.
b. 1.
upper Serjt. for the motion.

Upper Serjt. shewed cause against the rule; and admitted the execution was sued out against the defendant in time, insisted that an action was brought upon the judgment in second term, which ought to be considered as a charge in execution within the meaning of the rule, or at least that it is a sufficient cause why the plaintiff had not proceeded to sue out execution within the time prescribed by the rule.

we were all clearly of another opinion, that it was no cause in execution. And we would not give so much countenance to this method of proceeding by action upon the judgment, when the defendant was liable to be charged or sued in execution (though by law this may be done) as to make it to be a sufficient cause.

He therefore made the rule absolute (a)."

(a) See rule of Court, H. 8 G. 2. C. B.

1744, 5.

H. 18 Geo. 2. PARNHAM and Three Others *against* PACEY and Others.
Monday,
Feb. 11th.

The defend- **T**O trespass for breaking and entering the plaint
ants justifi- and eating the grafs with sheep &c, the defend
fied, in tresp- and under a prescriptive right of common of past
pass, under a- place where &c parcel of the waste or common ca
right of perley Plains otherwise Mapperley Hills in the tow
common of perley Plains, in the defendant Pacey, in right of a certain
pasture: the- singtonham, with the appurtenances in Nottingham, of which he
plaintiff re- in fee, for all his commonable cattle levant and ca
plied an in- all times of the year.

&c by the The plaintiffs replied that the waste or comm
lord of the manor, a Mapperley Plains &c had been immemorially par
manor, a- manor of Nottingham; that the mayor and burgesse
verring a- singtonham were seised of the said manor, and that
sufficiency of time when &c they enclosed and approved the plac
common left tion, part of the said waste or common called Mapper
for the de- there being then left in the residue of the said wa
fendant and all closed sufficient common of pasture for all the co
&c and all cattle of the defendant (Pacey) levant and couchan
other per- said messuage &c and "of all other persons of rig
sons of right and using common of pasture in the said waste &c;
having and the mayor and burgessees afterwards and before the t
using com- &c demised the said close &c to the defendants for 5
mon &c;" the defendant traversed the suffi
the defend- ciency in
ant travers- those words;
ed the suffi- and after
ciency in verdict for
those words; the plaintiff
and after on an issue
verdict for on that tra
the plaintiff verse the
on an issue Court re-
on that tra- fused to
verse the grant a re-
Court re- pleader, say-
fused to ing those
grant a re- words
pleader, say- meant "all
ing those persons hav-
words ing a right
meant "all to vie the
persons hav- common."

The defendants, in their rejoinder, traversed the
of the common not inclosed left for the commonabl
Pacey and "of all other persons of right having
common of pasture in the said waste" &c.

Upon this traverse an issue was taken.

And after a verdict for the plaintiffs, the defendant
a rule to shew cause why a replender should not be

after argument was discharged (a), and the plaintiffs judgment.

The following account of this case from Mr. J. Abney's MS. "*Bottle*" contained a rule to shew cause why a final judgment should not be awarded, and why a replender should be awarded; and he and Skinner Serjt. insisted that "having and using" was an immaterial issue and too far for every one having a right, it possibly use it. And therefore ought to have been only on the common, and not on the usage. not only an improper issue, but immaterial, like debt upon bond ment before the day *Cro. Jac. m. Rep. 148; Salk. 223; and 2*. And an immaterial issue is d. 1 *Lev. 32*.

The plaintiffs *Willes, Belfield*, and Serjts. argued that by law and the stat. of *Merton 2 Inst. 87*. they approve the waste and com-

mons that the tenants do not use, leaving sufficient common of pasture at the time of the approvement. "Using and having" imply no more than a prescriptive right; usage is the evidence of the right. *Godb. 55; 1 Sid. 237*. The issue is not immaterial; and if it be only improper, a replender ought not to be awarded. 1 *Lord Raym. 167 (1)*. The true rule is that where the Court can give judgment on the whole verdict and pleadings no replender ought to be awarded. 1 *Lev. 32*.

By *The Court*, Here is sufficient for the Court to give judgment upon. In the plea and issue it is "of right having and using common," that is "all persons having a right to use the common."

And per the Chief Justice and *Burnett J.* the plaintiffs had judgment. *Abney J.* being a burgess of *Nottingham* gave no opinion."

PARRHAM
against
PARRY.

(1) *Cary v. Hinton*, 2 Str. 973. S. C.

THE KING against The Archbishop of YORK and HAYES.

H. 18 Geo. 2.
Tuesday,
Feb. 12th.

ARE impedit. The defendant moved to plead two pleas on the stat. 4 & 5 *An. c. 16 (b)*.

objection made against it by *Agar Serjt.* was that the King was not bound by this statute, because not expressly. That the words of the clause being "plaintiff and defendant" could never be intended to include the King; it is plain by the next (c) clause that the King was intended to be included, because there are directions

When the King is plaintiff in aquare impedit the defendant cannot plead double under the stat. 4 and 5 *An. c. 16*.

sect. 4. it is enacted that "any or tenant in any action or suit, plaintiff in replevin in any court," may, with the leave of the court, plead as many several matters as shall think necessary for his defence. The fifth section provides that if matter shall, upon a demurrer be deemed insufficient, costs

shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in the like manner, unless the judge who tried the issue shall certify that the said defendant or tenant or plaintiff in replevin had a probable cause to plead such matter &c.

concerning

concerning the payment of costs in case there is a demurrer to the pleas or a verdict for the plaintiff and the Judge does not certify that there was good cause for pleading such double matter. And he said that it had been holden that the statutes of *officis* do not extend to the King. That the Court of King's Bench had denied a defendant to plead two pleas in an information in the nature of a *quo warranto* (a), though by the opinion of six Judges against six that is to be considered as a civil action (b). That the same had likewise been denied after two solemn arguments in the Exchequer on an information of intrusion (c), which is certainly a civil action, where it was held (P. 16 Geo. 2.) that the King was not within the words (d) of intent of the statute.

Lord Chief Justice for the defendant insisted that, this being a civil action, the King was within the intent of the statute; it being a remedial law, and therefore included though not expressly named. He relied much upon the exceptions in the proviso of some criminal prosecutions, and said that exceptions prevent *regulam de non exceptis*. He admitted that it had been denied in informations in nature of a *quo warranto*, but insisted that they are to be considered as criminal prosecutions, and therefore is a great difference between those and the present case. And he endeavoured to make a distinction between an information for an intrusion and the present case. He referred to the stat. 9 Hen. 6. c. 20., which extends the stat. 1 Hen. 6. to writs of mandamus and informations on that statute.

I THOUGHT it a difficult point, and desired time to consider of it, and so did my Brothers *Abney* and *Burnett*; but they seemed inclined to think that two pleas could not be pleaded in the present case. And

Vol. 1. - Cases cited in Park
Rep. 1. - See now 21 Geo. 3. c. 12
 which allows a defendant to plead two informations in nature of a *quo warranto*, that he has exercised his office or warrant in the 15 years before the granting of the information. He may plead several matters, with the leave of the Court.

R. v. Rouse, 4 Geo. 3. 1 Nov. 1801; see now 21 Geo. 3. c. 12. This point was also decided in *R. v. Young, M. 1802, 1 S. M. 101.* But in a similar

quest case, *R. v. Francis, 2 D. & B. 484*, the Court of King's Bench granted a new trial, saying that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding, and that there were several instances since the case in *Stratton* in which a new trial had been granted.

(a) *The Attorney General v. Allgood, Park Rep. 1.*

(d) Except in certain cases enumerated in sect. 24.

(c) Sect. 7.

My

By Brother *Abney* cited 2 *Inst.* 424, and *Savile* 2., where ^{1744, 5.} it is holden that the statute of *Westm.* 2. c. 30. concerning *nisi prius* does not extend to the King (a); and that although the act is general, yet a *nisi prius* cannot be granted where the King is party, or where the matter toucheth the right of the King, without a special warrant from the King or the consent of the Attorney General. He said likewise that c. 30. of the same act, concerning bills of exceptions, was never held to extend to the crown (b). And he mentioned some (c) where such pleas had been denied; and said that he thought that the stat. 9 *An. c.* 20., extending this statute to writs of mandamus &c rather strengthened the objection.

The King
against
The Arch-
bishop of
York.

Justice J. also cited a case, where it had been holden that the words "plaintiff and defendant" could not mean the King."

—The rule, for leave to plead double, was in the term following, discharged. *Vid. Barnes*, 353.

Ex. Dyde and another, 7 Durnf. 361. 8 P.

The stat. *Westm.* 2. (13 Ed. 1. c. 31., which gives the bill of exceptions these words "When one is pleaded before any of the Justices alledge an exception" &c. in his comment on this statute. 427, says "This act doth extend as well to the demandant or as to the tenant or defendant in suits real personal and mixed." *Ex. v. Higgins and others*, on a writ of a quo warranto information of exceptions was tendered by the demandant's counsel, and allowed by the court, though it does not appear that the case was afterwards argued in error. 1 *Ventr.* 366; Sir *John Holt*, 484; and *Skid.* 91.—So in the *information* in the exchequer *Ex. v. Smith* (*Rep. temp. Hardw.* 174) that when he was Attorney General he had known a bill of exceptions, "but then (said his Lord-

ship, they are properly civil suits for the King's debts; so in devenerant; but they are called the King's actions of trover, and before the late act of parliament the King recovered nothing but the value."—But a bill of exceptions cannot be allowed by the Justices of the peace at the quarter sessions on the hearing of an appeal against an order of removal. *The King v. The Inhabitants of Preston*, *Rep. temp. Hardw.* 249.

(c) "*Attorney General v. Bulkley* (1), in the exchequer; *M. 10 W.* 3. The defendant died after the verdict and before the day in bank; and *per Curiam*, the crown is not within the stat. 17 *Car.* 2 c. 8. to enter up judgment.—*Hil. 5 Geo. 2. B. R. Rex v. Franklyn*; *The Court* denied a *venire facias de novo*, because the King is not comprised within the words "plaintiff or defendant, demandant or tenant" in 7 and 8 *W.* 3. c. 32 (2).—*The Attorney General v. Allgood* (3)." *M. 8. Abney J.*

Park. Rep. 264. (2) See *R. v. Perry*, 5 *Durnf. & East* 453. Reported in *Park. Rep.* 1.

1744, 5.

H. 18 Geo. 2.
Tuesday,
Feb. 11th.JOHN ANDREWS *against* THOMAS CAWTHORP

[Eas. 13 Geo. 2. Rol. 1017.]

No burial
fee is due at
common
law: but it
may be dug
by custom in
any particu-
lar parish.
—The bu-
rial fees in
St. George's
Bloombsbury
are directed
by stat. 3. G.
2. c. 19. to
be fixed by
certain com-
missioners.

THIS was an action of assumpsit to recover 5*l.* for had and received by the defendant to the use of the plaintiff.

The defendant having pleaded the general issue, a verdict was found; stating, that as to 4*l.* 16*s.* 8*d.* the defendant did not undertake &c; and as to the sum of 3*s.* residue of the sum of 5*l.* they find that the defendant is by the order of *Edward Vernon* rector of the parish church of *St. George's Bloombsbury* in the county of *Middlesex*, as a burial fee claimed by *Dr. Vernon* for the burial of *A. Micklebrough* in the new cemetery or churchyard and belonging to the parish of *St. George's Bloombsbury* the said cemetery before the time that *A. Micklebrough* was buried there had by virtue of certain acts of parliament *An. c. 22*; *10 An. c. 11*; *1 Geo. 1. st. 1. c. 23*; *4 Geo. 1. c. 14*; and *3 Geo. 2. c. 19.* been purchased and assigned to the said parish of *St. George's Bloombsbury*, and been duly consecrated, as by the said acts is directed. *A. Micklebrough* was a parishioner of the parish of *St. George's Bloombsbury* at the time of her death, and the plaintiff is her executor; and that at the time of taking the fee of 4*d.* *Dr. Vernon* was and still is rector of the said parish of *St. George's Bloombsbury* (and the said cemetery) was formerly part of the parish of *St. Giles* in the fields, and was duly divided and separated therefrom by the commissioners, in pursuance of the directions of several acts of parliament, and the instrument for the division was duly inrolled in chancery as the said acts direct; and before the burial of the said *A. Micklebrough* the parish of *St. George's Bloombsbury* was duly consecrated. There is an immemorial custom within the parish of *St. Giles* for the rector of the parish of *St. Giles* to receive a fee of 4*d.* for the burial of every parishioner buried in the cemetery of the said parish or in any other of the burial places of the

parish, and a larger fee for every parishioner buried within the church of the said parish. That the new cemetery in which *A. Micklebrough* was buried never was any part of the ancient burying places belonging to the parish of *St. Giles*, nor ever was part of the parish of *St. Giles*, but was part of the parish of *Saint Pancrass*, and lies in the fields upwards of a mile distant from the church and rectory-house of *Saint George's Bloomsbury*. And then the jury made the general conclusion, and prayed the advice of the Court &c.

1744, 5.
ANDREWS
against
Caw-
THORNE.

After two arguments, the one in the *Michaelmas* term preceding, the other in this term, by *Skinner* and *Prime King's* Serjeants for the plaintiff, and *Willes King's* Serjeant and *Vynne* Serjeant for the defendant, and also by *Dr. Vernon* himself, the opinion of the Court was given for the plaintiff by *Lord J. (a)*, the Lord Chief Justice declining to give any opinion on account of his being a parishioner of *Saint George's Bloomsbury*.

Judgment for the plaintiff.

(a) The following opinion of the Court was given by Mr. Justice *Abbey*, who first stated the pleadings and the special verdict.

"The general question is whether *Dr. Vernon*, rector of *Saint George's Bloomsbury*, is well entitled to the burial fee of 3s. 4d. for the burial of *Ann Micklebrough* his parishioner in the new cemetery; and this question, as my Brother *Burnett* and I conceive, will depend entirely, not on any construction but, on the plain words of the statute 10 Ed. 2. c. 11. and 3 Geo. 2. c. 19. which I will read at large by and by.

But as I conceive it not altogether foreign or improper to follow the learned Serjeants in their arguments, I shall

In the first place give a short abstract or historical account of burial by the ancient law civil and canon.

2dly, A succinct history of burials and burial fees by our common law; and

3dly, Consider the particular case of *Dr. Vernon*, the rector of *Saint George's Bloomsbury*.

Now it is most notorious and certain that all burials by the Roman laws were prohibited not only within the temples

but even in cities and large towns, and by the very words of the law of the twelve tables *hominem mortuum intra urbem ne sepelire*. And this prohibition was founded on a prudent state policy, to prevent infection, from a great number of corrupt corpse lying contiguous in putrefaction; and it is well known that the poorer sorts in great parts of the kingdom are buried in shrouds without coffins even to this day.

But when popery grew to it's height, and blind superstition had weakened and enervated the laity, and emboldened the clergy to pillage the laity, then in the time of Pope *Gregory 1st.* (vid. *Gibson Cod.* 544) and soon after other canons were made, that bishops abbots priests and faithful laymen were permitted the honour of burial in the church itself, and all other parishioners in the church-yard, on a pretence that their relations and friends on the frequent view of their sepulchres would be moved to pray for the good of the departed souls.

And as the parish priest by the canon was the sole judge of the merits of the dead

1744, 5.

OMICHUND *against* BARKER.

H. 1 Geo. 2.
Feb. 23.
In Chan-
cery.

SEVERAL persons resident in the *East Indies* and professing the *Gentoo* religion, having been examined on oath administered

The deposition of witnesses professing the *Gentoo* religion, who were sworn according to the ceremony of their religion taken under a commission out of chancery, admitted to be read as evidence.

dead and the fitness of burial in the church, and he would only determine who was a faithful layman, they only were judged faithful, whose executor came up to the price of the priest, and they only were allowed burial in the church, and the poorer sort were buried in the church-yard. But in neither case was any fee claimed or pretended to be due for the celebration of the office. But in the first place as the church was the rector's freehold, the payment was made in consideration of breaking the ground and floor, and the sum was contracted for; and in the latter case some small voluntary oblation was frequently made, and which by length of time has grown up in many parishes into a customary payment; and yet *Lyndwood Lib. 5 tit. 2. fo. 278.* condemns it as *Simony*.

This affair of burial soon growing very profitable, a new canon was made, (Vid. 1 *Gibson* 543.) That no person was to be buried out of his parish without the consent of or till the oblation was paid to the parochial minister. But it is worth while to observe that none of these canons are in force here at this day; and I think the only canon now admitted and received by our laws relating to this question is the canon 68 of the canons 1603, which is in these words; "No minister shall refuse or delay to bury any corpse that is brought to the church or church-yard on convenient warning given him thereof;" and this seems a kind of transcript of the old law. *Jus sepulture vel sacramenta ecclesie nullo denegentur ob defectum pecunie*; *Lyndwood* page 278.

And the burial of the dead is (as I apprehend) the clear duty of every parochial priest and minister; and if he neglect or refuse to perform the office,

he may by the express words of the canon 86 be suspended by the ordinary for three months. And if any temporal inconvenience arise as a nuisance from the neglect of interment of the dead corpse, he is punishable also by the temporal courts, by indictment or information, *H. 7. G. 1. B. R.* That court made a rule on Mr. *Taylor*, rector of *Davenry* in *Northamptonshire*, to shew cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish.

It is worth observation that no ancient or modern constitution or canon fixed or pretended to fix any fee either for sepulture or the burial office; and *Lyndwood* (ubi supra) calls it *Simony*. The truth is, the canons could not fix any fee; for Lord *Holt*, in *Salk. 332.*, truly says that the canons cannot take any money out of laymen's pockets. Thus much is sufficient for the first head, how sepulture stood at the canon law.

Now, Secondly, to consider how it stands by the common law. My Brother *Wynne* attempted to prove that the burial fee was the same as the corpse present, or mortuary; and cited 21 *H. 8. c. 6.* to shew that 3s. 4d. was the least sum by the statute paid for a mortuary. If he had been pleased to cite the preamble, he would see how the poor labourers and others were squeezed by the clergy. And Dr. *Gibson* does by no means like that statute (vid. 2 *Gibson*, 745.) But there is no colour to imagine that a present made on the burial of the dead, which was a gift by way of recompence for subtracting personal tythes and offerings, a kind of commutation, is like to a burial fee; vid. 2 *Inft.* 491. And even in mortuaries it is to be noted that they were not due by common

ered according to the ceremonies of their religion un- 1744. 5.
commission sent there from the Court of Chancery, it

became **ONICHUM**
against
BARKER.

ght, but by custom only. The
corse" is the same as "corpse."
corse present is a gift with the
body. However this may be,
most clear and certain, that by
common law of England, no fee is
due for baptism or burial,
is de jure or of common right ;
where any fee is due, it must be
custom of the particular parish
e, which customs like all other
s (if controverted) is triable and
liable only in the King's tempo-
ral . To this purpose I cite *Bur-*
r Dr. Lancaster et al. Hil. 9 W.
l. 332, but more fully reported,
W. 3 fo. 171 (1). Bardeaux v.

Protestant had his child bap-
tized the French church in the Savoy,
Lancaster vicar of Saint Mar-
the fields, in which parish the
was, together with the parish
belled, against him for the fee
ad, for the vicar and 1s. for the
and per Holt no fee is due of
a right for baptism or burial,
ere due it must arise from cus-
om the duty must be performed;
allowed the case in *Hob. 175*
1w; and upon solemn argument
hibition was granted 2 *Lutw*
Anderson v. Walker Sacramenta
esse libera; in the case of a
1 fee. And in *Salk. 234*. The
ad chapter of Exeter's case, it
judged that no fee is due for
unless by custom.

those few cases are sufficient on
ad; since the defendant's coun-
sidedly owned this point, that no
fee was due of common right,
t due without the help of a cus-
om and this brings me to
third and last point which we
to be a very clear and a short
whether Dr. Vernon is entitled to
of 3s. 4d. for the burial of Ann

Micklebrough in the new cemetery of
Saint George's Bloomsbury.

Had the right of Dr. Vernon depend-
ed on the canon law only, it would not
have assisted him. Had it depended
on custom, it would have helped him
in the parish of *Saint Giles*, if he were
rector there. But this right depends
neither on the common law or custom,
but on the plain clear and express
words of two acts of parliament, which
have destroyed the customary payment
of 3s. 4d. in such part of *Saint Giles's*
parish as is now part of *Saint George's*
Bloomsbury, and introduced a parlia-
mentary payment and a new method
of ascertaining adjusting affixing and
settling the burial fees.

The words of 10 An c 11. s. 21.
are these; "It is enacted and declared
that all parochial customs usages bye-
laws and privileges as are now in force
or use within any present parish which
shall be divided by virtue of this act
shall, notwithstanding such division,
continue and be in force as well in and
for every new parish, as in and for
such parish as shall remain to the pre-
sent parochial church &c." If this
clause had stood without any variation,
we are of opinion, that Dr. Vernon
would be entitled to receive the sum
of 3s. 4d., which the verdict finds to
be the customary fee due to the rector
of *Saint Giles* to the burial of every
parishioner. And we are of opinion
that this clause hath clearly transferred
and carried over to the new parish of
Saint George's Bloomsbury all legal and
reasonable customs in *Saint Giles's*,
and even though the new cemetery of
Saint George's Bloomsbury was never
any part of *Saint Giles's*. But sect.
31. has varied the twenty-first section,
and enact, "That it shall and may be
lawful for the commissioners or any
five of them to ascertain the sum of
money that shall be paid to the rector

1744, 5. became a question whether those depositions could be read in evidence here; and the Lord Chancellor conceiving it to be a question of considerable importance, desired the assistance of Lee Lord Chief Justice B. R., Willes Lord Chief Justice C. B., and the Lord Chief Baron Parker, who after hearing the case argued were unanimously of opinion that the depositions ought to be read.

SCRIMWED
against
BARKER.

The case is shortly reported in 1 *Wils.* 84, and more fully in 1 *Atk.* 21. The following opinion was delivered by

Willes Lord Chief Justice C. B. "I could satisfy myself by merely saying that as to the present question I am of the same opinion as the Lord Chief Baron: but as this is in a great measure a new case, as it is a question of great importance, and as so much has been said by the counsel on both sides, I believe it will be expected that I should give my reasons for the opinion which I am going to give, though in the course of my argument I must necessarily touch upon many things that have been already better expressed by the Lord Chief Baron.

and each officer belonging to each church for every burial in any of the cemeteries or church-yards by this act intended to be purchased."

And the statute 3 G. 2. c. 19. sect. 5., after taking notice of former statutes, superadds several conditions precedent to the rector's right of a burial fee. "Whereas by the said recited acts the commissioners or any five of them are empowered to ascertain the sums of money that shall be paid to each officer belonging to each new church, be it enacted that the commissioners with the consent of the vestry shall have full power to fix and ascertain what sums shall be paid to the rector and each officer of the new church of *Saint George's Bloomsbury* for or in respect of any burial, which sums when so ascertained shall be registered in *Duchess's Commons*, and when so registered shall be deemed and are hereby declared to be the sums that shall be

paid to the said rector and parish-officers for every such burial."

So that until the commissioners and vestry have fixed the sum to be taken and the same registered neither the rector as rector, or any of the parochial officers, can take 3s. 4d. or any fee for the burial in the new cemetery in *Saint George's Bloomsbury*.

The commissioners and vestry have an arbitrary power to settle the sum, which may be more or less than 3s. 4d. in the old parish. When it is settled and registered, the rector will be legally entitled to the sum so ascertained. But it is not ascertained and registered; therefore

Judgment must be for the plaintiff."

— "N. B. A writ of error was brought on this judgment in B. R.; and in *Michaelmas* term 22 G. 2. the judgment of C. B. was affirmed." MS. *Abury* J.

Though

ough it be necessary only to give my opinion whether 1744, 5.
 positions taken in the present case can be read or not,
 may be proper in order to come at this particular ques-
 in the first place to consider the general question, whe-
 in infidel, I mean one who is not a christian, for in that
 Lord Coke certainly meant it, can be admitted as a wit-
 n any case whatsoever. If I thought with my Lord
 that he could not, I must necessarily be of opinion, that
 positions in the present case could not be read as evi-
 . On the other hand, if I thought that infidels in all
 and under all circumstances ought to be admitted as
 sses, the consequence would be as strong the other way,
 these depositions ought to be read. But if I should be
 opinion (and I shall certainly go no further) that some in-
 in some cases and under some circumstances may be
 tted as witnesses, it will then remain to be considered,
 her these infidels, who are examined in the cause under
 circumstances in which they appear in this court, are
 witnesses or not.

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to the general question, Lord Coke has resolved it in the
 tive, *Co. Lit.* 6. *b* That an infidel cannot be a witness;
 it is plain by this word "infidel" he meant *Jews* as well
Heathens, that is, all who did not believe the *christian reli-*

In 2 *Inst* 507. and many other places, he calls the
Infidel Jews; and in the 4 *Inst.* 155, and in several
 passages of his books, he makes use of this expression
Infidel Pagans, which plainly shews that he comprized both
Jews and *Heathens* under the word *Infidels*; and therefore
Hawkins (though a very learned pains-taking man) is
 only mistaken in his *History of the Pleas of the Crown*, 2
 p. 434., where he understands Lord Coke as not exclud-

the *Jews* from being witnesses, but only *Heathens*. But
 Chief Justice Hale understood this in another sense in
 remarkable passage of his, which I shall mention more
 icularly bye and bye. I shall therefore take it for granted

Lord Coke made use of the word *Infidels* here in the
 eral sense; and that will, I think, greatly lessen the au-
 rity of what he says; 'because long before his time, and
 ate almost ever since the *Jews* have returned into Eng-
 , they have been admitted to be sworn as witnesses. But
 ink the counsel for the defendant seemed to mistake the
 reason

1744, 5. reason upon which Lord *Coke* went. For he certainly did not go upon this reason, that an infidel could not take a christian oath, and that the form of the oath cannot be altered but by act of parliament; but upon this reason, though

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502, of this notion of Lord Coke's, and which was cited by 1744, 5. one of the counsel, but I think that it very well deserves every epithet that he has bestowed on it. I have dwelt the longer upon this saying of his, because think it is the only authority that can be met with to support this general assertion, that an infidel cannot be a witness. For though it may be founded upon some general sayings in *Brañon*, *Fleta*, and *Briton*, and other old books, those I think of very little weight, and therefore shall not repeat them; first, because they are only general dicta; and in the next place, because these great authors lived in very bigotted Popish times, when we carried on very little trade except the trade of religion, and consequently our notions were very narrow, and such as I hope will never prevail again in this country. As to what is said by that great man the Lord Chief Justice *Farlescue*, in his book *De Laudibus*, b. 26, that witnesses are to be sworn on the holy evangelists; he is speaking only of the oath of a *christian*, and plainly had not the present question at all in his contemplation. To this assertion of my Lord Coke's (besides what I have already said) I will oppose the practice of this kingdom before the *Jews* were expelled out of it by the stat. 18 E. 1. For it is plain both from *Madox's History of the Exchequer*, p. 167 and 174, and from *Seld.* vol. 2. p. 1469, that the *Jews* here in the time of King *John* and *Henry* the Third were both admitted to be witnesses and likewise to be upon juries in causes between *Christians* and *Jews*; and that they were sworn upon their own books or their own roll which is the same thing. I will likewise oppose the constant practice here almost ever since the *Jews* have been permitted to come back again into *England*; viz. from the 19 Car. 2., (when the cause was tried which is reported 2 *Keble* 314,) down to the present times, during which I believe not one instance can be cited in which a *Jew* was refused to be a witness and to be sworn on the Pentateuch. To this assertion I shall likewise oppose the very great authority of Lord *Hale*, 2 vol. 279. And though this has often been mentioned by the counsel, it is so full of law, of good sense, and the spirit of christianity, that I think it cannot be repeated too often; decies repetita placebit. "It is said by Lord Coke that an infidel is not to be admitted as a witness; the

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of a *juramentum hoc regis violatum* is not to be
is used (as I have been informed) amongst all
the oaths of idolatrous infidels have been ac-
monied laws of many kingdoms, especiall
per verum Deum creatorem; and special law
touching the forms of the oaths of
Covarruvias tom. 1. p. 1. de juramenti for-
matione a case where it would be very hard
it should not be taken by a *Turk* or *Jew*, u-
der the pain of perjury: for possibly he might think him-
self obliged if he were sworn according to the
the Courts of *England*: but then it must be a
evidence of such testimony must be left to the
the opinion of Lord *Hale* out of *Covarruvias*
and for all that I do not lay any great stress
out of the Civil Law Books, not only becau-
se this case does not want them, but likewise
because that there are particular laws and
countries which determine this question there,
therefore not so applicable to the present case,
because that there is any act of parliame-
nt on this matter. This use indeed, and the
reason of these citations to shew that the opi-
nions of other countries has been for adm-
ission of the same.

And I answer that I shall give to this affi-
davit in this case the same as his own u-

th the true God by giving worship to false gods. This 1744, 5.
 (saith he) was moved by *Publicola* to *Saint Augustine*,
 us resolveth the same; "He that taketh the credit of
 to swearth by false gods not to any evil but good, he
 ot join himself to that sin of swearing by devils but is
 r with those lawful leagues; wherein the other keepeth
 h and oaths; but if a christian should anyways induce
 r to swear by them, he would grievously sin. But
 that such leagues are warranted by the word of God;
 dents thereto are permitted." This is (I think) as in-
 nt as possible with his notion that an infidel is not fide-
 and a full answer to what he said in *Calvin's* case on
 ad; and therefore I shall leave him here, having (I
 quite destroyed the authority of his general rule, that
 ut a christian ought to be admitted as a witness.

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ill now proceed to explain the nature of an oath, which
 think contribute very much towards the determination
 general as well as the present question. If an oath
 merely a christian institution, as baptism, the sacrament,
 e like, I should be forced to admit that none but a
 n could take an oath. But oaths were instituted long
 christianity was made use of to the same purposes as
 ere always held in the highest veneration, and are al-
 old as the creation. Juramentum (according to Lord
 nself) nihil aliud est quam deum in testem vocare; and
 re nothing but the belief of a God and that he will
 and punish us according to our deserts is necessary to
 a man to take the oath. We read of them therefore
 most early times. If we look into the sacred history,
 e an account in *Genesis*, c. 26. v. 28. and 31; and
Genesis, c. 31. v. 53, that the contracts betwixt *Isaac*
imalech, and between *Jacob* and *Laban*, were confirmed
 tual oaths; and yet the contracting parties were of
 Serapat religions, and swore in a different form. It
 bundle's to cite the places in the *O'd Testament* where
 n is made of taking an oath upon solemn occasions,
 w great a reverence was always paid to it. I shall
 ke notice of three, one in *Numb.* 30. 2. "He that
 th an oath bindeth his soul with a bond." Another
 t. c. 6. v. 13. "Thou shalt fear the Lord thy God,

N n

and

“I will swear by his name.” And another, *Psa'ms* 15 v. 5
 “As a righteous man is described in this manner, “Ora-
 tion searcheth unto his neighbour and disappointeth him not,
 though it were to his own hindrance.”

From the passages of the *New Testament*, where mention
 is made of an oath, it is plain that it continued to be used in
 the same manner, and to be had in the same, if not greater,
 reverence after the coming of our Saviour. The nature of
 an oath was not at all altered, only as the promise of rewards
 and punishments in another world was then more clearly re-
 vealed, the obligation of an oath grew much stronger, and
 those who were really christians were under a greater appre-
 hension of breaking it. “An oath for confirmation (with
 God) that is an end of all strife,” *Heb. c. 16*. And I cannot
 omit mentioning one passage more out of the *New Testa-
 ment*, where what great reverence was paid to an oath even
 by the most wicked men; and under what great apprehen-
 sions they were of breaking it. It is in *Matt. c. 14. v. 6* to
 12, and is related in the same manner by *Saint Mark, c. 6*
 v. 17 to 20, that *Herod* having sworn to *Herodias* that what-
 ever she asked of him he would give it her, though he was
 knowing how when she asked of him the head of *Saint John*
Baptist, or for *his sake* and the sake of them who
 were with him he would not reject her. And I cannot help
 repeating in this place (though a little out of course) take
 notice of what is said by *Lactantius* on this subject, that some
 times, who were so very wicked as not to be afraid even
 of committing murder, yet had such a veneration for an oath
 as that the fear of being forsworn that when purged upon
 their consciences could not deny the fact.

If we turn our eyes to the authors, we shall find pretty much
 the same reverence of an oath. I shall mention only two or
 three of the most ancient and best of them. It appears in
 the *works of Homer*, that not only his heroes but likewise
 his gods whom he represents as gods of the second rank
 as the poets of some being, frequently confirmed their pro-
 mises by an oath, and they were then looked upon
 as inviolable. In two places in *Hesiod*, the one in his book
 de

ratione deorum, and the other in another book, it is said 1744. 5. terrible misfortunes and punishments will befall those who falsely. So in the beginning of *Pythagoras's Golden* considering an oath as very sacred and as a sort of re-^{OMICHUND} worship. And *Hierocles*, who is very large in his ^{against} nt on this passage, says an oath was looked upon by ^{BARKER.} sient fathers as one of the most solemn acts of reli- I shall conclude with *Cicero*, who never speaks of an it with the greatest reverence, and as the strongest tie can be laid upon men, *Nullum vinculum* (says he) ad *andam fidem majores nostri arctius jurejurando credi-*

To these great authorities I shall only beg leave to sentiments of two modern writers, but writers of very credit, I mean *Grotius de jure belli et pacis; lib. 2. c. 1.* His words are, *Apud omnes populos et ab omni ca pollicitationes promissa et contractus maxima sem-* fuit *jurisjurandi.* And *Tillotson's Sermons*, vol. 1. p. here he says that "It is the general practice of man- which has universally obtained in all ages and nations firm things by an oath in order to the ending of dis- s."

very plain from what I have said that the substance of has nothing to do with Christianity, only that by the in religion we are put still under great obligations not uilty of perjury: the forms indeed of an oath have ice varied, and have been always different in all coun- cording to the different laws religion and constitution e countries. But still the substance is the same, which God in all of them is called upon as a witness to the f what we say. *Grotius* in the same chapter sect. 10. *orma jurisjurandi verbis differt, re convenit.* There ral very different forms of oaths mentioned in *Selden*, p. 1470.: but whatever the forms are he says, that is nly to call God to witness to the truth of what is "fit Deus testis," "fit Deus vindex," or "ita te ljuvet," are expressions promiscuously made use of in n countries; and in ours that oath hath been fre- varied; as "ita te Deus adjuvet tacis sacrosanctis angeliis;" "ita &c et sacrosancta Dei Evangelia;" &c et omnes sancti." And now we keep only these n the oath, "so help you God," and which indeed

what of them, be the external form what
God thought to be a witness, as is clear f
of our Saviour in *Matthew*. chap. 23. v. 21. an
swearing by the Temple sweareth by it a
witness therein; and he that sweareth by h
swears by the Throne of God and by him that
said what was said by the counsel that Chri
the law of *England*, (which is certainly true
witness by laws) and that therefore to admi
swearing is contrary to the law of *England*;
what I have already laid down that there is
argument, since an oath is no more a part
of any other religion in the world. I
shall now add another argument which was made
and cannot be altered but by act of parliame
ment. The same oath here hath been frequently
sworn to by the king. And what Lord Coke sa
in his 4th Inst. 135, that an oath cannot b
made and altered, but by authority of parlia
ment. Now the same oath or oaths of of
ficers, Commissioners, Judges, Sheriffs, and the
like are sworn by witnesses. As to the pa
rent of the said *Temple* where the Lord Chi
was a Jew or not, who was a Christian or not, who
was a Jew or not, and dress and was goi
down to court, and as to what was said that h
could have refused to swear a man on the l

witness should be examined in any other manner than in the common form upon the Holy Evangelists. 744, 5.

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Having now I think sufficiently shewn that Lord Coke's rule is without foundation either in scripture, reason, or law, that I may not be understood in too general a sense, I shall repeat it over again, that I only give my opinion that such infidels who believe a God and that he will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this though a Christian country (a). And on the other hand I am clearly of opinion that such infidels (if any such there be) who either do not believe a God, or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them. I therefore entirely disagree with what is reported to have been said by Lord Chief Justice *Ley* in 2 *Roll. Rep.* 346. *Tr.* 21 *Jam.* 1. *B. R.*, that in the trials of matters arising beyond sea we ought to allow such proof as they beyond sea would allow. This would be leaving this point on so very loose and uncertain a foot, that I cannot come into it; for if this rule were to hold, considering in what a strange manner justice is administered in some foreign parts, God knows what evidence must be admitted. Nor can I agree with the resolution in the case of *Alfop v. Boustrell, Cra.* *Jac.* 541, 2. *M.* 17 *J.* 1. *B. R.* where it was holden that a certificate under the seal of the minister at *Strect* and of the said town of the marriage of two persons there, and that they cohabited together as man and wife, was a sufficient proof. To admit the certificate of the minister of the fact of the marriage at a place where there is no bishop might perhaps be equal and be resembled to the certificate of the bishop (b) here, which is in some cases conclusive evidence of a marriage. But I am clearly of opinion that the certificate of their cohabiting together ought not to have been admitted. For our law never allows

(a) See *John Morgan's case*, *Leach Cr. Cas.* 58. where a Mahometan was sworn upon the Koran at the *Old Bailey*, in a prosecution for a capital offence.

(b) See a learned argument of the

late Lord Chief Justice (*Eyre*) of the Common Pleas on the subject of the Bishop's certificate of a marriage in *Ilderton v. Ilderton*, 2 *H. Bl. Rep.* C: B. 153. et seq.

a certificate

and that he shall be punished in the next world as well as in this, if he does not swear the truth, I think that the same credit ought not to be given to an infidel as to a Christian, because he is plainly not under so strong an obligation.

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I have now done with the general question. And what I have said upon that must plainly shew of what opinion I am in respect to the present question; and therefore I shall be very short as to that. I think, after what I have already said, I need say nothing more to determine this point than barely to state the facts relating to it as they stand now before the court.

It is admitted that the cause is concerning a mercantile affair, which was transacted in a foreign heathen country, at *Calcutta*. It must be agreed that it is greatly to the advantage of this nation to carry on a trade and commerce in foreign countries, and in many countries inhabited by heathens and particularly in this town, in which we have established a factory for that purpose. A trade was accordingly carried on there between the plaintiff a heathen and subject of that country, and a Christian merchant a subject of *England*. It is insisted by the plaintiff that the *English* merchant, being greatly in his debt, withdrew into *England* and consequently was not amenable to the courts of justice in that country, where if he could have tried his cause this evidence which is now in dispute would have certainly been admitted. He followed his debtor into *England*, which was the only remedy that he had left, and filed his bill against him in the Court of Chancery here. No one will (I believe) now say that he had not a right to bring such a suit, or that he is not entitled to justice. For though there was such an old notion in popish times, and for some little time afterwards till the reformation was fully established, that even an alien friend especially if he were an infidel could not sue in a court of justice here, this most absurd wicked and unchristian notion has (God be thanked) been long since exploded, and will I hope never be revived again. It being admitted that he may bring his suit here, and consequently that he is entitled to justice, it follows that he must be at liberty to produce his evidence here in order to make out his case. And if he produce his evidence, it must be upon oath; for it would be absurd to give an

1744. 5. an infidel more credit than a Christian, which we must do
 an infidel's evidence be necessary in order to do justice,
 yet he cannot be examined upon oath; he must therefore
 examined upon oath in some shape or other. In order
 to obtain justice the plaintiff in this cause laid his case prop
 before the Court of Chancery, and prayed a commission
Calcutta; and the Court of Chancery, I think very rightly
 with great justice, ordered a commission to go, and that
 words "on the Holy Evangelists" should be omitted,
 the word "solemnly" inserted in their room; and like
 very prudently directed that the commissioners should cer
 upon the return of the commission in what manner the
 was administered to the witnesses examined on the com
 mission; and what religion they were of. The commissio
 accordingly returned that the oath was administered to
 witnesses in the same words as here in *England*, which
 answers the objection (if there was any thing in it) that
 form of the oath cannot be altered; and they certified
 after the oath was read and interpreted to them, they touc
 the bramin's hand or foot, the same being the usual and
 solemn manner in which oaths are administered to witne
 who profess the *Gentoo* religion, and in the same manne
 which oaths are usually administered to persons who pro
 the *Gentoo* religion on their examination as witnesses in
 courts of justice erected by virtue of his Majesty's letters
 tent at *Calcutta*; and they further certified that the witne
 so examined were all of the *Gentoo* religion. This certifi
 I think, fully answers the objection that it does not app
 that the witnesses believe a God, or that he will punish th
 if they swear falsely; which (as I have already said) I ad
 to be requisites absolutely necessary to qualify a person to
 an oath. I do not at all rely upon the books which w
 cited and which give an account of the *Gentoo* religion.
 it is plain from the certificate itself that they believe
 worship a God, and that they have priests for that purp
 which would be of no use if they did not believe that
 would reward or punish them according to their deserts
 certificate likewise answers this objection, that the oath b
 only read to the witnesses it does not appear that they sai
 did any thing which signified their assent to it; for touc

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nd or foot of the priest after these words "so help me" 1744, 5.
 ' it being their usual form, is as much signifying their
 as kissing the book is here, where the party swearing
 se says nothing. And the case cited by Lord Chief Baron OMICHUND
 & *Sid. 6. Mich. 1657.* plainly proves this, where Chief against
 : *Glyn* was of opinion that Doctor *Owens* holding up BARRETT.
 ht hand was sufficient without touching the book. And
Stairs in his *Institutes of the Laws of Scotland*, p. 692,
 ns this, where he says, "It is the duty of Judges in
 the oaths of witnesses to do it in those forms that will
 ouch the conscience of the swearers according to their
 sion and custom; and though quakers and fanatics de-
 g from the common sentiments of mankind refuse to
 formal oath, yet if they do that which is materially
 me, it is materially an oath.

e only objection that remains against admitting this evi-
 is that these witnesses will not be liable to be indicted
 rjury; because they are not sworn *supra sacrosancta*
Evangelia, which words, as was insisted, are necessary
 ry such indictment, and therefore they are not under
 me obligations to swear truly as Christian witnesses are.
 his objection has been in a great measure already an-
 d by the Chief Baron, and it may receive two plain an-
 ; first, that these words "*supra sacrosancta Dei Evan-*
 ' or "*tactis sacrosanctis Dei Evangeliiis*" are not neces-
 o be in an indictment for perjury. They have been
 d in many indictments against Jews, of which several
 ents have been laid before us; and they are not in the
 ents of such indictments which I find in an ancient and
 ood book, entitled *West's Simboleography*: but it is only
 here "*supra sacramentum suum dixit et deposuit*" or
 mavit et deposuit." Besides this argument, if it prove
 ing, proves a great deal too much; for if there
 ny thing in it, many depositions even of Christians
 een admitted, and many more must be admitted
 there will be a manifest failure of justice, where the
 es are certainly not liable to be indicted; for when
 positions of witnesses are taken in another country,
 uently happens that they never come over hither,
 or

1746 5. If they cannot be indicted for perjury because the fact was committed in another country. Those therefore who are plainly not liable to be indicted for perjury have often been, and for the sake of justice must be, admitted as witnesses; and so there is an end of this objection.

From what I have said it is plain that my opinion is that these depositions ought to be read in evidence."

EDWARD EVANS against HENRY KING, otherwise HENRY VAUGHAN KING.

HENRY King, otherwise *Henry Vaughan King*, of &c was attached to answer *Edward Evans*. The declaration, sent down which was in assumpsit for work and labour, described the defendant by the name of *Henry*.

The defendant pleaded in abatement, thus; *Henry Vaughan King*, who was attached by the name of *Henry King* says that he is not nor can be understood to be the same person against whom the said *Edward* hath brought his action, because his name of baptism is *Henry Vaughan* and his surname *King*, and by the same name hath always been named and called, whereas it is that his name of baptism is that of *Henry* alone, or by the name of baptism of *Henry* alone he was ever named or called &c.

The plaintiff replied that the said *Henry Vaughan* is and at the time of filing both the original writ and long before was called and known as well by the name of *Henry* alone as by the full name of *Henry Vaughan* &c; and this he prays may be regarded of by the court.

The defendant demurred, and shewed for cause that the plaintiff relied new matter, and had concluded his replication to the country, when he ought to have concluded with an averment.

This

This case was argued on *Wednesday* the 15th of *May* by 1745.
Beisfeld Serjt. for the defendant, and by *Draper* Serjt. for
 the plaintiff; and the opinion of the Court was now given
 by

Evans
 against
 King.

Willes, Lord Chief Justice (after stating the pleadings,) as
 follows.

“ Upon this demurrer it comes now before the Court;
 and objections have been taken by my Brother *Beisfeld* to
 the declaration and the replication, and by my Brother
Draper to the plea.

The objection to the declaration was, that the defendant
 is sued by two Christian names, whereas a man cannot have
 two Christian names at one and the same time; and for this
 my Brother *Beisfeld* cited *Panton v. Chowles*, *Moor* 897;
Field v. Winlow, *Cro. Eliz.* 897; and *Watkins v. Oliver*, *Cro.*
Jac. 558. The case in *Moor* of *Panton v. Chowles* is thus;
 the plaintiff, as administrator of *Eleanor Dancafell*, brought
 an action of debt against the defendant upon a bond entered
 into by him; he pleaded that *Eleanor* in her lifetime by the
 name of *Ellen* released to him all actions and demands: the
 plaintiff replied non est factum *Eleanoræ*, on which issue was
 joined, and found for the plaintiff; and upon a motion in
 arrest of judgment it was holden that the verdict was right,
 for that a person cannot have two names of baptism at the
 same time. But the pleadings may happen to be so that a
 person may be concluded by estoppel to say that his name is
 otherwise than that by which he has signed a deed (a). The
 case of *Field v. Winlow* in *Cro. Eliz.* is thus; in debt on
 bond the plaintiff declared that the defendant *James* by the
 name of *John Winlow* bound himself in a bond to the plain-
 tiff; the defendant prayedoyer of the bond, and it appeared
 that the defendant had bound himself by the name of *John*,
 to which the defendant demurred; and all the Court held
 that the action lay not, for *John* cannot be *James* (b). The
 case of *Watkins v. Oliver*, in *Cro. Jac.* is much the strongest

(a) Vid. *Smithson v. Smith*, *E.* 17
G. 2. sup. 451.

(b) But if the defendant had been
 sued by the name of *John*, and had
 pleaded in abatement that his name
 was *James*, the plaintiff might have

replied that the defendant was as well
 known by the one name as the other,
 and given in evidence the defendant's
 signature to the bond by the name of
John.

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against
KING.

of the three. There the plaintiff declared against *Edmund* alias *Edward Watkins*, that he by the name of *Edmund* was bound in a bond for 100*l.*, and for nonpayment the action was brought; the condition was that *Roger Watkins* should pay 50*l.* to the plaintiff upon such a day. The defendant pleaded payment at the day, and issue thereupon, and found for the plaintiff, and judgment for him in the King's Bench. But upon error brought in the Exchequer Chamber the judgment was reversed by all the justices and Barons, for *Edward* is bound and *Edmund* is sued, which cannot be intended to be one and the same person; and no averment can help it, for one cannot have two Christian names, and there can be no estoppel as this case is. The case of *Clarke v. Istead* in 1 *Lutw.* 894. is thus; in debt on a bond the plaintiff declared that Sir *Robert Clarke* the defendant, by the name of *John Clarke*, became bound; the defendant pleaded non est factum, and on a special verdict judgment was given in the King's Bench for the plaintiff: but it was reversed by the whole Court in the Exchequer Chamber. Many cases were cited in 1 *Lutwich* as a foundation for this reversal; among the rest the cases before mentioned and the case of *Shotbolt* in *Dyer* 279. b. Tr. 10 & 11 *Eliz*. There an action of debt on a bond was brought against *William Shotbolt*; and the plaintiff declared against him by the name of *William Shotbolt* alias *John Shotbolt*: The bond appeared on the evidence to be made and signed by *John Shotbolt*; and upon a special verdict found the Court were of opinion that he could not recover in that action, but that the action ought to have been brought against him by the name of *John*, and then he would have been estopped to say that his name was not *John*, he having signed the bond by that name. Another case likewise is there said to have been afterwards adjudged in the same manner between *Turpin v. Jaxon*, Hil. 18 *Eliz*. There is also cited in *Lutwich* the case of *Maby v. Shepherd*, where in an action of debt brought against *John* the executor of *Edmund Shepherd*, the bond set forth is said to be the bond of *Edmund*: but upon oyer prayed it appeared that he was called *Edward* in the bond, and though it appeared that he signed it by his right name *Edmund*, and though on non est factum pleaded a verdict was given for the plaintiff, yet

nt was arrested by the opinion of the whole Court, 1745.
was I think going a great way.

rever, whatever might be my own opinion if this were point, I think I am obliged by these authorities, which of them much stronger than the present case, to be nion that the writ and declaration in this case are not

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against
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For these cases are all upon bonds, where there is more reason to say that the defendant may have two than in the present case. For in the case of a bond if tion be brought against the defendant by the name used in the bond, he is estopped to say that that is not ne; and to be sure he cannot say that his right name his name; so that in that case he may in some sense be have two names. But the defendant cannot be said sense to have two names in the present case, which is ion on the case upon several promises and neither of on a note. And therefore as no man can have two at the same time, this declaration must be wrong. what is said in *Salk. 6. (a)*, that a man may have two, the one of baptism and the other at confirmation, at after confirmation his name of baptism does not no more can be meant, but that if before confirma- for a man may not happen to be confirmed until after -one) he executed any thing by his name of baptism y be sued by that name after his confirmation. But onfirmation he has no other name but the name that n took (b); otherwise the rule would not hold (which certainly true) that a man cannot have two christian at the same time.

therefore I am of opinion that the declaration is not it is immaterial whether the plea or replication be or not. But as objections have been made to both of I will say a little upon each.

I first, as to the plea; I am clearly of opinion that it is od, for that it is no answer to the plaintiff's declaration: only says that his name of baptism is *Henry Vaughan*,

Olman v. Walden, Salk. 6. *Gawdy*, Chief Justice of the Court of re the instance of *Sir Francis Common Pleas, Co. Lit. 3. a.*

and


1745. and traverses that his name *of baptism* is *Henry* alone, or that he was ever called or known by that name *of baptism*, which may be true and yet his name may be *Henry*; for it may be his name of confirmation, or he may be a Jew or a Heathen. And I can find but one precedent of this sort which is that of *Shield v. Cliff*, in *Furesley* 104; and there the plea was over-ruled, and a respondeat ouster awarded. In all the precedents in *Rassall* (a) which were cited, the defendant traverses that the plaintiff was ever called or known by that name, and there is not a word of baptism in any of them. And the plea in 1 *Lutw.* 10, from which it was said that this was copied, is quite different from this; for there the traverse is in these words, *absque hoc quod ipse nominatur vel vocatur Robertus seu per idem nomen vel cognomen unquam cognitus seu vocatus fuit &c.* and not a word of the name *of baptism*.

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Being clearly of opinion that the plea is bad for this reason, I shall say nothing of the other objection to it, that it begins with saying that the defendant was attached by the name of *Henry King*, which is contrary to the declaration.

And being of opinion that the declaration and plea are both bad, I will give no positive opinion on the replication, but I am inclined to think that that is bad likewise for the reason assigned as cause of demurrer; for the plaintiff having alleged new matter, and not barely denied the defendant's plea, he ought to have given the defendant an opportunity of answering it, and so not to have concluded to the country but with a *hoc paratus est verificare*. The case of *Holman v. Walden*, *Salk.* 6. can be no authority in the present case either on the one side or the other, because there the declaration plea and replication were all different from the present. The defendant is named but by one name in the writ and declaration; in the traverse which is the material part of the plea there is not a word of the name of baptism; and there the replication exactly follows the words of the traverse, and therefore a conclusion to the country was proper. Besides, as the case is reported, I cannot help saying that it is a single case.

(a) *Rass. Entr.* 50; 108; 234.

upon the strength of the authorities which I have 1745.
 med, I am of opinion that the declaration is not good, 
 at judgment in abatement must be given for the defen-
 that the plaintiff's writ be quashed."

EVANS
 against
 KING.

STONE *against* RAWLINSON and Another.

E. 18 Geo. 2.
 Monday,
 May 27th.

HIS was an action on a promissory note for fifty guineas. The execu-
 made by the defendants dated the 11th of May 1730, tor or ad-
 payable to *James Watson* or order; and the decla- ministrator
 stated that *Watson* died on the 1st of April 1734 intef- of a person,
 upon whose death administration of his goods and chat- to whose
 is granted to *Ann Webb*, who indorsed the note to the promissory note
 iff. is made

this declaration the defendants demurred, and shewed it over, so
 use that the plaintiff did not bring into the Court, or as to enable
 to the Court, any letters of administration of *J. Wat-* the indorsee
 goods granted to *Ann*, and that he did not shew who to sue in his
 id administration of *Watson's* effects to the said *Ann*. own name.
 —But the
 indorsee

in case was twice argued, the first time in *Michaelmas* tion make a
 1744 by *Agar* Serjt. for the defendant, and *Draper* Serjt. profert of
 e plaintiff, the second in *Hilary* term following by *Birch* the letters
 b Serjt. for the former and by *Prime King's* Serjt. of admini-
 And though Mr. *J. Burnett* appears at first to have been stration &c
 rd to give judgment for the defendant, he afterwards granted to
 d with the rest of the Court, whose opinion was now the indorser.
 red, as follows, by. Barnes 164-
 S. C.

His, Lord Chief Justice. "This comes before the
 on a demurrer to the plaintiff's replication.

ere are two causes of demurrer assigned in the pleadings,
 , That there is no profert made of the letters of admini-
 ion;

y, That it is not said by whom the letters of admini-
 m were granted, so that it does not appear whether
 vere granted by proper authority.

And

1

this is a matter which greatly concerns the trade and
 merce of the nation, and as it has never been judicially
 mined before, we thought ourselves at liberty and that
 s the properest method we could take to inquire of traders
 merchants of undoubted credit what has been the prac-
 in this case ever since the act of the third and fourth of
 in *Ann*, and how the act has been understood by them.
 have done so, and they all agree that it has been the
 tant practice for executors and administrators to indorse
 notes and inland bills of exchange; and that promisory
 when so assigned have always been considered to be as
 h within the statute, and that they may be put in suit by
 ndorseees in the same manner as if they had been indorsed
 he testator or intestate. As therefore we are fully satis-
 that this has been the constant practice, and that the law
 een always so understood amongst traders, and as the
 rts of law have always in mercantile affairs endeavoured
 lapt the rules of law to the course and method of trade
 der to promote trade and commerce instead of doing it
 hurt, so we are determined in the present case to make
 indorsement valid according to the practice, if we can
 ny means make it consistent with the words of the act
 agreeable to the rules of law. And we think it is easy
 both.

1745.

Stowe
 against
 Rawlin-
 son.

he words of the act, when considered, will I think plainly
 ant it, I mean the following words in the first section of
 ct, "That any person, to whom a promisory note that
 yable to any person or his order is indorsed or assigned,
 o money therein mentioned ordered to be paid by in-
 ment thereon, shall and may maintain an action for such
 of money either against the person signing such note, or
 st any of the persons who indorsed the same, in like
 er as in cases of inland bills of exchange." What was
 ractice before and since as to inland bills of exchange
 an only learn from the report of merchants, and they
 imously agree that they were always looked upon to be
 ignable by executors and administrators as to enable the
 ee to bring an action in his own name: And I think
 onstruction agreeable to the plain intent of the act,
 h is that whereas the assignee of such notes before had

O o

certainly

an equitable interest to another, and to enable the name of the executor or administrator (and by the statute such equitable interest is conveyed), it follows that since the statute such assign his own name. And I think that the case *Manning*, 5 G. 1., in this court and reported and 312, which was the only case that was cited to bear any resemblance to this, plainly warranted. A promissory note drawn by *Manning* was to *Stratham* or his order; *Stratham* assigned it to plaintiff; on a demurrer to the declaration, the effect of the assignment was only to *A.* not saving *to him* or *for* he could not assign it to the plaintiff. And Justice at first inclined; but afterwards it was the whole Court that it was good. For if the order is assignable, it will always remain so; and the whole interest in the note may assign it as he

On the strength of this case I think I may maintain which will be conclusive in the present case. The absolute property in a bill made payable over may assign it as he pleases within the statute, and such assignee may maintain an action; the executor or administrator of a person whose bill is made payable, has the absolute property therefore he may assign it to whomsoever he pleases and the assignee may maintain an action in his own name.

we being all of that opinion, judgment (a) must be
plaintiff."

1745.

his judgment was afterwards of King's Bench, *M* 20. *Geo.* 2. 2 *Str.*
on a writ of error in the Court 1260; 3 *Wils.* 13 and 2 *Burr.* 1225.

STONE
against
RAWLIN-
SON.

KIN WILLIAMS WYNNE and CORBET KYNASTON *E.* 18 *Geo.* 2.
Demandants against WILLIAM THOMAS Tenant, Monday,
JAMES APPERLEY B. D. and ALATHEA his Wife May 27th.
vchees.

WRIT of error was brought in the Court of King's Bench to reverse a common recovery suffered of lands in Shropshire, of which Alatheia Apperley was tenant in tail, in a recovery Watkin Williams Wynne Esq. and Corbet Esq. were demandants, William Thomas tenant, and Apperley and Alatheia his wife vouchees, who vouched Simon vouchee. The error assigned was that Alatheia before the giving of judgment in the recovery. And having been joined on that fact, the cause was tried at summer Assizes at Shrewsbury 1741, where a special verdict was found, stating (inter alia) that Alatheia died on the 15th of May 1740, which was six days before the return of the writ of summons.

The Court will amend a recovery whenever it can be done consistently with the rules of law. — But they cannot amend the writ of entry where it is not the mistake of the clerk and where there is nothing to amend by. — The common vouchee cannot appear by attorney before the day of the return of the writ of summons.

A special verdict was argued in the Court of King's Bench in *Mich.* 17 *Geo.* 2. (vid. 1 *Wils.* 35.) In *Hilary* term that Court was about to pronounce judgment of reversal, (vid. 1 *Wils.* 42:) but the parties claiming under the recovery desired that the judgment might be suspended until a motion was made in this court to amend the recovery.

A motion was accordingly made, and the question was several times argued by Willes King's Serjeant and Wynne Esq. and the Attorney General in support of the rule, and by Skinner Esq. and the King's Serjeants and Bootle Serjeant against it; and on the 15th day the opinion of the Court was delivered; as follows: —

Lord Chief Justice. "This comes before the Court on a motion to amend the recovery.

Barnes 17.
7 *Med.* 492.
Oct. ed. 2.C.

O o 2

I shall

1745.

WYTHE
against
THOMAS.

I shall first state how the recovery now stands;
Secondly, How the fact really was;
Thirdly, what are the amendments that are desired.

First, The recovery is of *Easter* 1740. The writ of entry was returnable quind. *Pasch.* which in that year was the 20th of *April*, so the 23d was the appearance-day; on which day (as the record now is) it is said that *William Thomas* appeared in his proper person and vouched *J. Apperley* and *Alathea* his wife, whereupon a writ of summons and warrantizandum was awarded, returnable on the morrow of the *Ascension*; so, as this recovery now stands, it could not be suffered before the morrow of the *Ascension*, which was the 16th of *May* in that year.

Secondly, The fact as it appears in the deed and by affidavits is, the writ of entry tested the 2d of *April*, returnable the 20th: The writ of summons and warrantizandum issued on the 23d, returnable the 16th of *May*; and it could not be made returnable sooner, because there must be five returns inclusive between the teste and return. Before the stat. 16 Car. 1. c. 6. nine were necessary, but by this statute they are reduced to five. The dedimus to take the warrant of attorney was tested 25th of *April*; the warrant of attorney was executed by *J. Apperley* and his wife on the 30th, and the mitimus by which it was sent out of Chancery into this court was tested 8th *May*. *Alathea* died on the 10th *May*. And the recovery was in fact arraigned at the bar on the 5th of *May*, but *Alathea* never appeared in person, and therefore every thing that was done was done under the authority of the warrant of attorney. The deeds of lease and release to make a tenant to the præcipe, and in which there was a covenant to suffer a recovery and a declaration to the uses, bore date the 1st and 2d of *February* and were proved to be executed about that time. The objection to the recovery was that *Alathea* was dead before the 16th of *May*, on which day (as it now stands on record) it must be taken the recovery was suffered.

Thirdly, The amendments, which were desired, were of two sorts, either of which it was said would cure the defect in the recovery.

1st, It was desired that instead of these words "at which
 lay come *Watkin* and *Corbet*" &c, these words might be in-
 serted, "before which day, on the 5th day of May in the same
 term, here cometh as well &c." 1745.

WYNN
 against
 THOMAS.

2dly, The other amendment was, that the teste and the
 return of the writ of entry might be altered, so as to make it
 returnable crastino *Purificationis* in *Hilary* term, and then the
 summons ad warrantizandum might be made returnable the
 5th of May, which was the third return in *Easter* term, and
 then the vouches might appear by attorney on the 5th of
 May, and all would be right. And a multitude of cases were
 cited to shew that this Court, in favor of common recoveries,
 has from time to time made many great alterations in reco-
 veries in order to make them good. But I shall have occa-
 sion to mention but few of those cases, because we agree with
 the general determination, that as common recoveries are
 now become the common assurances of the nation, this Court
 will always make such amendments and alterations in common
 recoveries as to make them good and effectual if possible.
 But such amendments must be consistent with the rules of
 law, and there must always be some thing to amend by.

Before I consider the amendments proposed, I will lay one
 thing out of the case as quite immaterial, though it was often
 said and much insisted on by the counsel for the amendment,
 which is, that these warrants of attorney are in their nature
 irrevocable, and cannot be revoked without leave of the
 Court, because whether this be true or not (but I am very
 far from admitting that it is) it is nothing to the present case.
 If any argument could be drawn from it, it was most proper
 in the King's Bench, to shew that the record, as it stands, is
 right, and that it does not want an amendment. But it can
 afford no argument in either court. For whether the warrant
 of attorney were revocable or not by *Alathe* in her lifetime,
 it was certainly revoked by her death, and her attorney could
 not appear for her and in her stead after she was dead.

Having therefore laid this argument out of the case, I will
 now consider the first amendment proposed. As the recovery
 was

cases which were cited plainly prove this, reason of the case shews it. The case in 1 expressly to this purpose, that in common recover cannot appear by attorney but upon the day of the summons and warrantizandum. The author was attacked by saying that this is an anonymous charter saying upon a question put to Sir *Walter* 139. which was not unusual in the law, I think it is a great authority, as it is there for the declaration of all the Judges and Protectors because it has never been contradicted in any law, it is warranted by a very ancient and of great authority in 11 *Hen* 4. 28. "Thou" for 30. 3. 12, where it is expressly vouchee cannot appear by attorney but at the process. But to this case likewise it was does not appear by this, whether it was a common or adverse suit: but I think this will make for those rules concerning the process must common recoveries as in adverse suits, as appears the statute 16 *Car* 1. c. 6. which puts adverse more recoveries on exactly the same foot in recoveries. Besides this rule in the present case reason and the fact as it is now laid before it is admitted that the vouchee did not appear at the day of the return of the writ of entry *ad* returnam, the consequence of which is this

ette and the return of the summons ad warrantizandum, if he vouchee might appear by attorney at any time before the return. 1745.

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against
THOMAS.

The case which was much relied on, and which was the only one which was cited, which seems to bear any resemblance to this, is the case of *Winne v. Lloyd*, P. 16 C. 2., upon a writ of error in B. R., reported in 1 Lev. 130. 1 Sid. 113. and in several other books: but we think that it is no authority in respect to the present amendment which is desired; first, because it is very difficult to know how that fact stood, it being very differently reported in almost every book; secondly, because there is no pretence there, that the vouchee appeared by attorney before the day given in court, but the objection is that either the warrant of attorney or dedimus was not tested in due time. Besides that was a question that did not arise on a motion for an amendment in this court, but upon a writ of error in the court of King's Bench. If therefore that case be of any weight, it may be and to be sure will be considered in the Court of King's Bench. Besides I must own that I have no great opinion of the determination in that case if it be as it is reported: however it is enough to say that it is not parallel to the present case. We cannot therefore agree to make the first amendment that is proposed, because we are satisfied that it would not make the recovery at all better than it is at present.

As to the second amendment, I am clearly of opinion, that it would make the record right, and cure all the errors of this recovery, if we were warranted to make it by the rules of law and by the facts which have been laid before us. But we think that we cannot do it by the rules of law, or if we could that there is nothing to amend it by; for the facts are so far from warranting such an amendment, that they plainly shew that we ought not to make any such alteration.

The cases which were chiefly relied on as to this point were three precedents mentioned in *Pigot on Recoveries*, p. 173 and 174. In all these three cases the Court ordered the return of the writ of entry to be altered, because it was made returnable before the date of the deed which made the tenant to the præcipe, which at that time was held to be a fatal error.

cedent in *Pigot*, which is that of *Bunce and C. W. and M.*, and it appears by that that it was the clerk; that the deed in which it was covered the recovery warranted this amendment, and was made by consent of all parties; and probably two precedents could have been found it would that they were attended with the same circumstances ever they are only authorities that the *return* entry may be amended, but not that the *teste*. But I own that many authorities were cited to shew that originals may be amended, and so. It will be unnecessary to mention many of them. I admit in general that originals may in many cases when returned into this court, and that they may be amended in some instances. But that which warrants such an amendment as is desired in *Gage's case*, as reported in 5 Co. 45. nearest to the present; but it is not rightly reported in *Coke*, and it has been contradicted in many cases held not to be law. The true rule is, that originals may be amended by 8 H. 6. c. 12. where it is only in case of negligence or ignorance of the clerk is not amended.

(n) By stat. 14 Geo. 2 c. 20. it is enacted that every recovery shall be valid, notwithstanding the fine or deed making the tenant to such writ is levied or executed after the time of the judgment if the deeds be entered which it is suffered, to make the tenant not executed till after the writ of seisin.

, nor any other mistake, when there is nothing to
 it by. This distinction is warranted by *Blackmore's*
1 Co. 159. *b.* 160. *a.*, and many other authorities.
 therefore the teste is void, as when it is made on a
 or in vacation-time, there it is amendable as the plain
 sion of the clerk; and so it is held in the case of the
 and *Tutchin*, 2 *Lord Raym.* 1066, and in 5 *St. Trials*
 where many cases are cited for that purpose. And if
 case were law, an impossible teste might be likewise
 ed for the same reason; for the teste in the writ of
 nt there was after the return. But *Gage's* case is other-
 eported in *Moor* 571. that this mistake was held not to
 endable, and that the fine was reversed on a writ of
 for that reason, and it has been found upon searching
 cord that the report in *Moor* is right (*a*). But I own
 point were to come as a new question before me, I
 be of the same opinion with Lord *Coke*, who often
 his own instead of the opinion of the Court. But I
 rne down by very great authorities, by the authority
 House of Lords and of all the Judges in the case of *The*
f Pembroke and Lord *Jeffereys*, as appears by the case before
 ioned in 2 *Lord Raym.* 1066, and in that case as reported
Salk. 52., where it is expressly said that *Gage's* case is
 w; and the same was again confirmed by the opinion
 e Court of King's Bench in the case of the *Queen* and
in. I will mention the very words that the Judges cer-
 by Lord Chief Justice *Holt* to the House of Lords
 ey are reported by *Salkeld*) being very applicable to the
 at case. That was the case of a fine; and the writ of
 ant was tested six months after the dedimus for the
 on, and the Court of Great Sessions in *Wales* had
 ded it; but it does not appear whether the teste was be-
 he return or after: but Lord *Holt* certified "that the
 of covenant being an original" was not amendable either
 e common law or by any statute; that neither the 14
 nor 8 *H. 6.* warranted such an amendment; and that
 was no difference as to that purpose between actions
 ble and adversary. For no one pretends to amend a
 e in a deed, and yet that surely is as much a common
 nce as a recovery; and that *Gage's* case in 5 *Co.* 45. is
 orted and not law." I fancy Mr. *Salkeld* has not rightly

1745.

WYNNE
against
THOMAS.(*a*) See also 6 *Mod.* 156.

1745. stated the certificate at the beginning ; for Lord Holt could not say in general that no original was amendable ; but the words of the certificate probably were, that the writ being an original *was not amendable in that instance* ; and I only rely on the latter words. which are very strong to my present purpose. But if Gage's case were law, yet neither that nor any other case which I can find would warrant the present amendment. For here is not the least pretence that there was any mistake misprision or nescience in the clerk, but the teste and return are both very proper ones, and the writ was certainly made out according to the instructions which he received. Which leads me to the other point,

Writ
against
THOMAS.

That if we could make this amendment by the rules of law, yet that there is nothing to amend by ; for the deed which have been read and referred to plainly shew that it was not the intent of the parties that such a writ of entry should be sued out as is now desired, but such an one as has been sued out and as now appears on the record. The deed of release says that the recovery shall be suffered before the end of *Easter term next ensuing or any other subsequent term* ; so there is no pretence to say that the parties intended to have a recovery in *Hilary* term, or that the writ of entry should be sued out sooner than it was : whereas if it were to be tested as is now desired, it must not only be tested long before the date of the deed, as it is to be returnable the very day after it, but like wise if the vouchees had appeared in person on the day of the return (being the third of *February*) and which they might have done if they would, if such writ of entry had been sued out, the recovery would have been a recovery in *Hilary* term, expressly contrary to the agreement of the parties.

We think therefore that we cannot consistently with the rules of law and justice make the second amendment which is desired. I do not know that in a court of law we are at liberty to shew any favor : but if it were in a court of equity, where sometimes favor may be shewn consistently with the rules of justice and equity, yet as here is an heir on the one side and a mere volunteer on the other, if any favor could be shewn, it must be to the heir, for a volunteer is entitled to none.

We

We are therefore all of opinion that we cannot amend the recovery, and that this rule must be discharged (a).

1745.

(a) *Vid Swann v. Broome*, 3 Burr. 1595; and 1 Bl. Rep. 496; 526.

WYNN
against
THOMAS.

HENRY LAYNG Executor of HENRY LAYNG against JOHN PAINE and FRANCIS PAINE, Executors of JOHN PAINE. T. 18 & 19 Geo. 2. Wednesday, July 3d.

DEBT on a bond given by the defendants' testator to the plaintiff's testator in 1000*l.*, dated the 3d of September 720. A bond given by any of the officers mentioned in the

The defendants cravedoyer of the condition of the bond; recited that the plaintiff's testator who was Archdeacon of Wells, had by his letters patent bearing date with the bond granted to John Paine and H. Layng his own son the office of register or scribe of the Archdeaconal Court of the Archdeaconry of Wells with the fees and profits thereof for their lives and the life of the survivor; and that the name of John Paine was only used in trust to and for the use and benefit of H. Layng (deceased) his executors &c, and that he (J. Paine) had not paid any of the fees and charges expended in and about the said patent &c; and the condition was that J. Paine should permit H. Layng (deceased) his executors &c to receive to his and their own use all the profits and emoluments issuing or to be made by the said office during the life of J. Paine, and should without any consideration or reward at the request and costs of H. Layng (deceased) his executors make and execute any deputation grant or surrender and do and execute any lawful act about the said office the execution and the profits thereof to such persons as H. Layng (deceased) his executors &c should desire or appoint &c.

stat. 5 & 6 Ed. 6. c. 15. for securing all the profits of the office to the person appointing, is void by that statute. —So is a bond given by such an officer to surrender whenever the person appointing chose. —The office of register of an archdeaconry is an office within that statute.

The defendants then pleaded, 1st, a performance of both parts of the condition by J. Paine deceased; 2dly, that the office of register &c was an office which touched and concerned the administration and execution of justice; and that the

The case was twice argued, the first time for the plaintiff, and *Belfield* Serjt. for the defence second time by *Eyre* Serjt. for the former, and Serjt. for the latter.

After the Court had taken time to consider their opinion was on this day delivered by

Willes, Lord Chief Justice, (after stating the following.

“ Upon this demurrer to the second plea comes before the Court. And the single question is this bond by reason of the condition be a void

It was insisted on by the defendants that it was void by the common law and the statute 5 & 6 Geo. 4. Whether or no it would have been void by the common law we need give no opinion, because we are all clear that it is made void by the statute.

The words of the statute are “ If any person at any time hereafter bargain or sell any office or place, or the reputation of any office or offices, or any part or parts of them, or receive have or take any money fee reward or profit directly or indirectly, or take any promise or agreement or covenant bond or any assurance to receive or ha

office or offices or any part of any of them, which office or offices or any part or parcel of any of them shall in anywise ^{1745.} ~~such or concern the administration or execution of justice &c.~~;” then follows a description of other offices not material to the present question; and then the statute goes on and inflicts several forfeitures and incapacities both upon the persons buying and the persons selling any such office or offices. Then follows in the third section of the act the clause, upon which the present question depends; “that all and every such bargains sales promises bonds agreements covenants and assurances shall be void to and against him and them to whom such bond &c shall be had or made.”

LAYING
AGAINST
PAINE.

That this is an office which concerns the administration and execution of justice (a) is admitted. If it were a new case, I should have had no difficulty in determining it to be so. but it has been so determined several times, particularly in a very solemn manner in *Dr. Trevor's case*, *Cro. Jac.* 269, and *12 Co.* 78, where the Lord Chancellor referred it to all the Judges, who were of opinion that this office was within the *stat. Ed. 6*. The same was likewise determined in the case of *Woodward v. Foxe* in the case of the register of an Archdeacon, *3 Lev.* 289; and *2 Vent.* 187.

The only question that remains is, whether this condition be within the provision of the statute, and makes the bond void; and we think it plainly within the words and provision of the statute.

First, An agreement to have all the profits is certainly an agreement to receive *some profit*, which is contrary to the words of the statute.

Secondly, This is directly contrary to the intent of the statute.

There were two principal reasons for making that statute; 1st, That offices might be exercised by persons of skill and

(a) In the case *Ex parte Butler*, on that the statute does not extend to *Mag.* 73, and *1 Will.* 210. It was held. offices concerning the police.

integrity

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LAYTON
against
PAINE.

integrity ; and 2dly, That they might take only the legal fees ; for those who buy their offices will be apt to make more than their legal fees, according to what is said in 3 *Inst.* 148, " they that buy will sell." Both these ends will be frustrated if this condition were good. For either, this *Joh. Paine* must execute the office for nothing, or he must take more than his legal fees ; for he was to account to the Arch-deacon for all the legal profits. No man of skill and integrity will throw away the greatest part of his time in executing such an office for nothing ; and if he has any thing for it, it must be extortion and by taking illegal fees, and so the second and principal end of the statute would be plainly eluded.

As we are of opinion that the first (a) condition of the bond is plainly void and illegal, we need go no further, both because the breach in the present case is assigned on that part of the condition, and likewise because it has been holden that if any of the conditions be void by a statute, the whole bond is void. So it is expressly determined in the case of *Norton v. Syms*, *Moor* 856. (b), and in the case of *Lee and his Wife v. Colehill*, *Cro. Eliz.* 529., and in several other cases.

But however as the second (c) condition has been spoken to, I will say a word as to that. And I think likewise that this is a void condition ; for the donor to oblige the officer to surrender whenever he requires it is to reserve to himself an absolute power over his officer, which he ought to do. Besides, if this were allowed, there would be a plain method chalked out to evade the statute ; for any one by this mean might sell an office for the full value. For let such a condition be put in, let the bond be given for the full value of the office, and let it be agreed between them that the officer shall refuse to surrender upon request, and then the grantor will recover on the bond,

(a) The first branch of the condition.

(b) A distinction is there taken between covenants or conditions void by the common law and those that are void by statute. It is said, when some covenants in an indenture are void by the common law, and the others good, a bond for the performance of all the covenants may be good as far as re-

spects the covenants that are good ; but otherwise if any of the covenants be void by the statute, there the bond is void in toto. See also 1 *Mod.* 35, 36 ; and *Roe v. Galliers*, per *Buller*, J. 1 *D. & E.* 139.

(c) The second branch of the condition.

and

and so have the full value of the office. This is so very plain, 1745. and so directly contrary to the words and intent of the statute, that I need not say anything more upon it.

LAYNE
against
PAIN.

This case was compared by the counsel for the plaintiff to the case of simoniacal bonds, and to be sure the comparison is a very just one: but it makes directly against the plaintiff; for it has been holden that a bond given by a parson to his patron to reside generally (as the present case is,) and not to a particular person, is void (a). And no one (I believe) can doubt but that if a man were to give a bond to his patron with a condition that the patron should receive the whole profits of the living, such bond would be simoniacal and void. The case of *Bellamy v. Burrow* (b) is a case of very little authority, and very little resembles the present case; 1st, Because it occasioned different opinions (c); and 2dly, Because it was never carried into execution. *Bellamy* there did not grant the office; but the King granted it in trust for *Bellamy*, and the King certainly is not within the statute (d) The cases likewise of *Gulliford v. Cardonell* (e), *Salk* 466, and *Godolphin v. Tudor*,

(a) When this case was determined, Tr. 18 & 19 Geo. 2., this appears not to have been considered: general bonds of resignation were then holden to be good. Vid. *Babington v. Wood*, Cro. Car. 180. and Sir W. Jen. 220; *Watson v. Baker*, Sir T. Raym. 175; *Wyndham v. Brown*, Say 141; *Peale v. The Countess of Carlisle*, 1 Str. 227; and *Grey v. Haffeth*, Amb. 268. However in a late case in the House of Lords, *The Bishop of London v. Eftsche*, May 1783, on a writ of error, a general bond of resignation was declared void, contrary to the opinion of all the Judges, except Eyre C. B. (late Lord Chief Justice of the Common Pleas;) and they reversed the judgment in B. R., affirming that before given in C. B.—But see *Bagshaw v. Bofsley*, 4 D. & E. 78; and *Partridge v. Whiston*, 11. 359.

(b) *Cas. temp. Talb.* 97.

(c) In that case the Master of the Rolls decreed that Mr *Burrow* should hold the office in his own right: but on an appeal this decree was reversed by

the Lord Chancellor, who ordered that Mr. *Burrow* should account for the profits of the office.—See Lord *Loughborough's* observations on that case, in 1 H. Bl. Rep. 333.

(d) Vide *Huggins v. Bambridge*, H. 14 G. 2. sup. 241.

(e) *Com. Rep.* 1; and 12 *Mod.* 90. S. C.

(f) And 6 *Mod.* 234. S. C. But the following manuscript note of that case is more full than either of the printed accounts of it.

“*Godolphin v. Tudor*, M. 3 An. B. R. Debt upon a bond. Oyer of the bond and of the condition, which was for the performance of certain articles; and reciting that whereas Sir *William Godolphin* was auditor of *Wales* for his life, he did depute the defendant's intestate to be his deputy therein, and made him a grant of all the fees perquisites and profits thereunto belonging, the deputy paying him 200*l.* a year: if the said intestate should accordingly pay that 200*l.* a year, then the bond to be void.

“To

1745. *v. Tudor, Salk. 468 (f)*, which were likewise cited for the plaintiff, are quite different from the present case. In both those the principal officer having an office, of which by law he might make a deputy, made a deputy, reserving in one case half the profits of the office, and in the other a certain sum not paying out of the profits: in the first case it was holden good, and in the second bad; but in the latter it was said that it would have been good if the sum had been reserved out of the profits; because if a man may by law make a deputy he must allow him something, and it can never be thought that he is to give him the whole profits. Besides, notwithstanding the deputation, he may execute the office whenever he pleases. But in the present case the Archdeacon could not execute the

LAWYER
against
PAINES.

"To this the defendant pleaded the statute of *Edw. 6.* against selling offices, and for making bonds and securities given to enforce such contracts void; and concluded with proper averments to shew this office within the statute.

"The plaintiff replied that the fixed salary of the said office was 20*l.* a-year, and the just and legal profits 32*l.* per annum, which the defendant's intestate during his life received annually.

"The defendant demurred; and judgment was for him, that the bond was void by the statute.

"This was settled upon great consideration after three arguments, wherein it was agreed that if an officer has a certain annual salary, or other profits amounting certainly to such a sum annually, a deputation of such office with a reserve of any sum out of it not exceeding the certain profits is no sale contrary to this statute. So if a deputy be appointed to an office consisting of uncertain profits, paying out of such profits any sum whatever, this deputation and contract for payment are good, because the deputy is to pay out of the profits only and cannot be charged for more than he receives. In these cases the principal does in effect only appoint a deputy, reserving to himself a part of the profits which are by the law his entirely, and do not

pass as incident to the deputation any farther than as they are expressly granted with it. Such deputations therefore are not sales of offices contrary to the statute, but only grants of them and of the profits qualified with some exceptions.

"But if an office consisting of uncertain fees be granted to a deputy together with all its fees, reserving a certain sum, such grant will be void; for it is not a deputation with a reserve of part of the profits, but an absolute disposition of the office and all the profits in consideration of a certain sum to be paid annually for them, whether the profits themselves amount to more or less (*1*) and is therefore in the nature of a sale prohibited by the statute.

"This case is not altered by any subsequent event of the office answering more in the contingent profits than the money stipulated to be paid for them; because the contract is to be adjudged ab initio good or bad according as it appears restrained by the statute or not, and is not to depend upon contingent consequences.

"Judgment for the defendant, which was afterwards confirmed in the House of Lords." MS. coll. *Willes* Ch. Justice.

(1) *Juxton v. Morris*, cited by Lord Loughborough, in 1 *H. Bl. Rep.* 331. & 1.

himself, but had only a power of granting it, and therefore is no pretence that he should receive any of the

1745.

these reasons we are all of opinion that this bond is void statute; and therefore judgment must be for the defendant (a)."

LAYNE
against
PAINES.

Court of Equity has in some cases interposed where it has been thought that of Law could not. *Laro v. Laro*, *Caf. temp. Talb.* 140, and 3 P. 3; *Morris v. McCulloch*, *Ambl.* 432; and *Hancington v. Du Chattel*, *Caf.* 124.—See also the cases of *Parjous v. Thompson*, 1 H. Bl. Rep. 1; *Garforth v. Fearon*, *ib.* 327; in the former of which it was holden in favour of the defendant to allow the plaintiff a certain proportion of the profits of an office (not within the statute *Ed. 6.*) in consideration of his procuring the defendant's appointment to it was void; and in that, where the defendant had declared that his name was only lent for the plaintiff on the defendant's being appointed to the office of collector of the customs at the port of *Carlisle*, and the ports and places pertaining on the plaintiff's application to the Lords of the Treasury to the office, and had promised to appoint such a deputy as the plaintiff nominated, and also to empower the plaintiff to receive the profits of the office, the case was within the statute 5 & 6 *Ed. 6.*, and that no action on the promise could be supported at law.—This appointment of Mr. *Fearon* gave rise to two actions in the Court of King's Bench, *Fearon v. Fearon* and *Fearon v. Potter*, in both of which the plaintiff failed.—See also *v. Preston*, 8 D. & E. 89.

WINSMORE against GREENBANK.

M. 19 G. 2.
Saturday,
Oct. 26th.

WINNER, Willes, and Hayward Serjts. moved for a new trial upon several affidavits, setting forth (as they alleged) that the verdict was against evidence, and the damages excessive (a), being 3000*l.*

Verdict not
set aside for
excessive
damages, in
action for
enticing

plaintiff's wife.—In such action the declarations of the wife not admissible in evidence in an action on the case for inducing the plaintiff's wife to continue absent it is to state that "the defendant unlawfully and unjustly persuaded, procured and enticed her to continue absent, &c., by means of which persuasion &c. she did continue absent; whereby the plaintiff lost the comfort and society of his wife;" without setting forth the means &c. used by the defendant.

Duberley v. Gunning, 4 D. & E. 651, and the cases there referred to, and of actions in which the Courts will interfere by granting new trials on the ground of excessive damages. In the case of *Duberley v. Gunning*, an action for criminal conversation, the Court of King's Bench refused to grant a new trial, although the damages (500*l.*) were much larger than under all the circumstances of the case ought to have been. But in a subsequent case, *Jones v. Sparrow*, 5 D. & E. 257, refusing an application for a new trial on the ground of excessive damages in an action for an assault and battery the plaintiff's counsel relied on *Gunning*, the Court said that was a case *siu generis*, and the damages were to be excessive they granted a new trial.

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would not make any rule, it
be read.

Hayward likewise menti
Judge would not allow the
en in evidence on either si
would not insist on that obje

My Brother *Burnett* and
ther *Abney* did right in refusi

——“ They then mo

——In order to under
arrest of judgment, it is ne
record.

The declaration containe
that on the 1st of *Januar*
24th of *December* 1742 bei
since deceased) unlawfully a
his consent departed and we
and continued absent and a
and upon the 8th of *August*
that the said *Mary* so lived
tate both real and personal
vifed to her by *W. Worth* l
and separate use and at her
thereupon she was desirous

The fourth count stated that the defendant concealed the plaintiff's wife until her husband caused her to be buried secretly, and kept her from the plaintiff for a year after her death; that the plaintiff lost the comfort and society of her said 8th of August until the time of her death; and of her fortune &c.

The defendant pleaded not guilty; and a verdict for the plaintiff on the three first counts gave 3000*l.* damages, and a verdict for the defendant on the last.

This case was argued on the 18th and 26th 1745, and the 29th of January following, *Willes* King's Serjeants and *Draper* and *Jefferies* for the defendant, in support of the verdict of judgment, and by *Prime* and *Birch* King's Serjeants and *Booth* Serjeant for the plaintiff; and on the 30th of January following the rule to arrest the judgment was discharged.

Willes, Lord Chief Justice delivered his judgment in the following effect :

Several objections have been taken by the defendant to this declaration in arrest of judgment; two of which were overruled, and three to the particular meaning of the

and the objection is founded on *Lit. f.* 108. and *Co. Lit.* 81. *lit.*, and several other books. But this general rule is not applicable to the present case; it would be if there had been *no special action on the case* before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy: but there must be *new facts* in every special action on the case (a).

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WINE-
MORE
against
GREEN-
BANK

The second general objection is, that there must be *damnum cum injuriâ*; which I admit. I admit likewise the consequence, that the fact laid before per quod consortium maritum is as much the gist of the action as the other; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid by which he lost it be a lawful act, no action can be maintained. By *injuria* is meant a *tortious* act: it need not be *wilful and malicious*; for though it be accidental, if it be tortious, an action will lie.

This rule therefore being admitted, the only question is whether any such injury be laid here; and this rule will properly come to be considered under the several objections made to the particular counts; for if any of them hold, then no injury is laid. I admit also that as the verdict is on three counts and the damages are entire, if either of the counts be bad, the judgment must be arrested. To the second count no objection was taken.

But the counsel for the defendant began with the third count, to which they took several objections, which are all false in fact.

(a) Vid. *Abby v. White*, 2 *Ld. Raymond* 957; *Passey v. Freeman*, 2 *D. & E.* 51; and *Chapman v. Pickersgill*, 2 *Will.* 146, in which last case, which was an action on the case for falsely and maliciously suing out a commission of bankrupt against the plaintiff, Lord Chief Justice Pratt (in answer to the objection of novelty) said "but it is said this action was never brought; and so it was said in *Abby v. White*: I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined; for there is nothing in nature but may be an instrument of mischief; and this of suing out a commission of bankrupt falsely and maliciously is of the most injurious consequence in a trading country."

ist, That

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1st, That it is not laid that the wife went away without the husband's consent; but it is expressly so laid.

WIFE-
MORRIS
against
GUYTON-
DAVE.

2dly, That it is not laid that the defendant knew of it; but it is laid in express terms that he did, and that knowing it he concealed and detained her.

3dly, That no request by the plaintiff to the defendant to deliver up the wife and refusal by the defendant are laid. It is not necessary to determine in this case whether a request and refusal were necessary, because both are expressly laid here: but, according to my present thoughts, in the case of a *detainer* I think them necessary. And as not guilty to the whole is pleaded in special actions on the case, it puts every fact that is laid in issue, I think it likewise necessary to prove the request and refusal, and we must take it that this was proved at the trial, the jury having found a verdict for the plaintiff.

The principal objections were to the first count, and they were three;

1st, That *procuring, enticing, and persuading*, are not sufficient, if no ill consequence follows from it;

2dly, That *unlawfully and unjustly* will not help the case; but the particular methods made use of should have been stated by which the defendant procured &c., otherwise this is leaving the law to a jury;

3dly, That no notice or request is laid, which is necessary in the case of the continuance, though it be not necessary if the defendant had at first persuaded her.

To the first there were two answers;

1st, That here is a consequence laid, that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune &c.;

2dly, Whether, "enticing" goes so far or not I will not nor need determine, because "procuring" is certainly "persuading"

"persuading with effect." I need not cite any authorities for this; because every one who understands the English language knows that this is the common acceptation of that word,

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WINS-
MORE
against
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BANK.

2dly, But, to be sure, it must be *an unlawfully procuring*, and that brings me to the second objection. It is not necessary to set forth all the facts to shew how it was unlawful (a); but would make the pleadings intolerable, and would increase the length and expence unnecessarily. It was said however that at least it was necessary for the plaintiff to add "by false insinuations:" but it is not material whether they were true or false; if the insinuations were true and by means of those the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant.

In answer to the objection that this is leaving the law to the jury, it must be left to them in a variety of instances where the issue is complicated, as, burglariter, felonice, proditorie, devisavit vel non, demisit vel non. But the Judge presides at the trial for the very purpose of explaining the law to the jury, and not to sum up the evidence to them.

As to the distinction between the beginning and continuance of a nuisance by building a house that hangs over or damages the house of his neighbour, that against the beginner an action may be brought without laying a request to remove the nuisance, but that against the continuer a request is necessary, for which *Penruddock's case*, 5 Co. 100, 101, was cited, and many others might have been quoted, the law is certainly so, and the reason of it is obvious. But that reason does not extend to the present case; because every

(a) This is not required even in some indictments. In *R. v. Eccles and others*, 24 Geo. 3. B. R. the defendants, who had been found guilty of a conspiracy, moved in arrest of judgment, because the indictment merely stated that they had conspired together by indirect means to prevent one H. B. exercising the trade of a taylor, without setting forth the means used; but the Court over-ruled the objection, saying that it was sufficient to state the conspiracy and its object. So in an indictment on stat. 37 Geo. 3. c. 70. it is sufficient to charge the defendant with having endeavoured to seduce persons serving in his Majesty's forces by sea or land from their allegiance and to induce them to mutiny, without setting forth the means employed, *R. v. Fuller, Bos. & Pull.* 180.

moment

variation were or were not made by the
shall not take notice of them, because I am
there are no defects to be cured, and that
would have been good even on a demurrer.
"unlawfully and unjustly" been omitted
might have been material, because it is la-
stances for the wife to leave the husband:
ration is framed, it is not necessary to enter
ration of that question. Many observations
made on the quantum of the damages given
it was said that it was uncertain whether or
had sustained any: those were proper ob-
motion for a new trial (which has been al-
but cannot have any weight on this motion)
ment, where every thing laid in the declara-
en to have been proved. I can see no re-
judgment, and therefore I am of opinion that
be discharged.

Mr. J. *Abney*, and Mr. J. *Burnett*, *ga*
feriatim, agreeing with the Lord Chief Jus-

1745.

DYKE and JOHN WEBBER Administrators
GREGORY GARDINER *against* JOSEPH SWEETING, Son and Heir of JOSEPH SWEETING, Father deceased.

M. 19 G. 2.
Friday,
Nov. 8th.

NANT. The plaintiff declares on an indenture of lease, dated the 22d of *November* 1727, whereby the said *Gregory Gardiner* deceased demised to the said *Gregory Gardiner* premises therein mentioned, being leasehold, to the said *Gregory* during the rest and residue of the said *Gregory* during the rest and residue of the said *Gregory* estate, redeemable on payment of 280*l.* and in the said *Joseph* his heirs executors or administrators to pay the said sum of 280*l.* within six months next after the date of the said indenture, the said *Joseph* the father covenanted for himself and his heirs executors administrators and assigns that the said sum of 280*l.* with its full interest should be paid to the said *Gregory* the plaintiff the true intent and meaning of the said

An action of covenant will lie against the heir on a covenant by which the ancestor bound himself and his heirs. In such an action it is not necessary to allege in the declaration that the heir had lands by descent: if he had none, he must plead it. To an action on a covenant to pay money on a particular day, the defendant cannot plead payment on a prior day, because if found one way it is not conclusive; but he must plead payment on the day. On a covenant to pay money at the end of six months, it will be understood to

such assigned was that the said *Joseph Sweeting* the defendant during his lifetime did not pay to the said *Gregory* in his lifetime to the plaintiffs or either of them after the death of the said *Gregory* the said sum of 280*l.* with interest for any part thereof at the end of six months next after the making of the said indenture, nor at any other time nor has the defendant since the death of his said father the said *Joseph* the same or any part thereof to them or either of them the said sum of 280*l.* and the interest thereof from the making of the said indenture hitherto are due, owing, and unpaid; damage 600*l.* &c.

defendant cannot plead payment on a prior day, because if found one way it is not conclusive; but he must plead payment on the day. On a covenant to pay money at the end of six months, it will be understood to

the defendant pleads that the said *Joseph* the father in his lifetime the 10th day of *May* 1728, paid to the said *Gregory* his lifetime the sum of 280*l.* with all interest due according to the form and effect of the condition of the said indenture.

defendant cannot plead payment on a prior day, because if found one way it is not conclusive; but he must plead payment on the day. On a covenant to pay money at the end of six months, it will be understood to

the plaintiffs reply; and protesting that the said plea of the defendant is insufficient in law, they for replication

mean calendar (not lunar) months. Semb.

lay

ing to the effect of the covenant above said
are ready to verify.

To this replication the defendant demurs;
shews that the plaintiffs by their replication
replied to the plea of the defendant, nor taken
nor in any manner confessed or avoided tra
the same; and for that the said plaintiffs by
on have alleged new matter not alleged i
tion, to wit, that the said *Joseph Sweeting* d
ed by the space of six months or more nex
of the said indenture, which matter tends to
dant into a departure in pleading; and the sa
double &c.

The plaintiffs join in demurrer.

Gapper Serjt., for the defendant, objecte
tion, that the plaintiffs ought to have taken
the defendant's plea, and not to have repl
And afterwards in his reply he took two
that the declaration does not say that the hei
that an action of covenant will not lie agai
only an action of debt.

Belfield Serjt. for the plaintiffs insisted tha
had plea, and that if the plaintiffs had join
they would have been tricked; for if a
for the plaintiffs, they could not have had

e plaintiffs of their action. And he said that when a covenant for himself, an action of covenant would lie against the heir, as well as an action of debt where a man sues himself and his heirs, otherwise the word "heirs" must be a nugatory word; and he said that in an action of debt against an heir (b), it is never alleged in the declaration that the heir hath lands by descent; but if he hath none, he must insist upon it by way of defence.

1745.

DEED
AGAINST
SWEET-
MEAT

d I, and my Brothers *Abney* and *Burnett*, were of opinion with *Belfield* in omnibus; so gave judgment for the plaintiffs (c).

per Serjt. cited *Baskerville v. Bruckett*, Cro. Jac. 450, in *Wm. Herbert's* case, 3 Co. 12. But upon looking into those cases, they are nothing at all to the purpose. He likewise insisted that the months should be taken to be months of 28 days each, and not calendar months, and reckoning but 28 days to a month the sixth months just ended on the 10th of *May*, and so the payment pleaded upon the day in the condition. But in the first place

the plaintiff reply that it was not paid on that day, on which issue is taken and for the plaintiff, the plaintiff cannot have judgment, because payment might have been made before that day. *Tryon v. Carter*, M. 8 Geo. 2. 1794 (1); and *Bull. N. P.* 162. In *Fletcher v. Kennington*, 2 Burr. and 1 Bl. Rep. 210, and also in an anonymous case in 2 Will. 1773, it was held that the plaintiff cannot demur to such a plea; for by demurring, he admits the truth of it, namely, payment before the day, which is express payment according to the condition; and that if he dispute the reality of payment at all he should reply that the money was not paid on that day at any time before &c; or he may reply that the defendant did not pay according to the form and effect of the said condition. *Bull. N. P.* 174; *Ld. Raymond* 1370.

Vid. *Gott v. Atkinson*, Hil. 18 G. 2. sup. 521.

A writ of error was afterwards brought in the court of King's Bench, the only objection taken by the plaintiff in error was the want of an assize (vid. 1 Will. 181;) thereby tacitly acknowledged the propriety of this writ in other points.

Though not stated in either of the printed reports of this case, it came to the Court of King's Bench on a writ of error from the Common Pleas, judgment of which last Court in favor of the plaintiff was reversed and a new assize awarded. MS. Coll. Willes Ch. J.

this

M. 19 Geo. 2.
Thursday,
Nov. 14th.

MILLS *against* HUGHES and

A person
who buys
and sells cattle
is a *drover*, and can
not be a
bankrupt.
Bull. N. P.
39. S. C.

“ IT came before the Court upon a case
Baron *Reynolds* at the last *Lent* assizes
county of *Gloucester*,

The case was thus; the plaintiff claimed
tation by *fieri facias* against the goods of
The defendants justified under a commission
awarded against the said *Liffully*, as assignee
commission. There was no doubt whether
ed, but the only question was whether he was
as could be a bankrupt. The evidence was
five years before the issuing of the said commission
used and exercised a trade in buying and
calves. That during the same time he was
farm of the yearly value of 35 £, on which
kept a stock of milking cattle equal to
value. Besides which he trafficked during
such cows and calves as aforesaid, which
be sold again in a course of merchandize
use of his farm, nor were they ever brought
sometimes sold in the same markets wherein
or otherwise as soon as the said *Liffully*
men to buy the same. It appeared like
Liffully was not possessed of any other lands
said, but if he were obliged for want of
ers to keep such cattle for a few days, he

by dealing in buying and selling cattle as aforesaid person capable of being a bankrupt within any of the statutes relating to bankrupts.

1745.

MILLS
against
HUGHES.

In order to prevent delay we permitted the case to be argued twice this term, first by Serjt. *Skinner* for the plaintiff and Serjt. *Prime* for the defendants, and then by Serjt. *Wynne* for the plaintiff and Serjt. *Wynne* for the defendants.

The only question was whether *Liffully*, as described in the statute, were a drover or not; because if he were, he was expressly excepted, and could not be a bankrupt by the 5 Geo. 2. c. 30. s. 40. the words of which are exactly the same purpose as the 5 Geo. 1. c. 24. s. 28, which is expired: the stat. 5 Geo. was continued (a) by the 9 Geo. 2. till 1750. and again by the stat. 16 Geo. 2. until Michaelmas 1750. The words of the statute on which this question arises are, "Whoever shall be receiver-general of the taxes granted by parliament, shall be entitled as such to any of the duties given by this act, or be deemed a bankrupt within the meaning of the statute now in force concerning bankrupts."

Brother *Abney* and I first doubted whether *Liffully*, as described in the case, was a drover within the meaning of the statute, considering a drover to be one who drove cattle for other persons, or at most only a factor who bought or sold for other persons and not for himself; and that therefore the words put in this clause in the statute by way of exception to the foregoing clause, it being there declared that a drover might be a bankrupt.

My Brother *Burnett* upon the first argument was of a different opinion, and thought that the word "drover" was to be taken in a more extensive sense, and that it not signified a drover or factor of cattle, but likewise one who bought cattle for himself at one market or fair and sold it at another.

(a) Made perpetual by stat. 27 Geo. 2. c. 16.

And

and to the one who buy cattle in one place and drive seems to be derived from the word "drive."

3rd. It is plainly made use of in this sense in 5 *Edw. 6. c. 14.* and 5 *Eliz. c. 12.* The act against regraters, forestallers, and engrossers. In these words, "provided also, by the authority aforesaid, that it shall and every person and persons known for a comers being licenced (as therein is mentioned) in each shire or counties where drovers have cattle, and to sell the same at reasonable prices and markets distant from the place that not the same forty miles at least." The act touching badgers of corn, &c. in sect. 2, 3, 4, 5, and 6, it is in 5 *Edw. 6. c. 14.* concerning drovers, & in sect. 5 concerning licensing and regulation, and there the word "drovers" is used in the sense now contended for by the plaintiff.

4th. There are several cases, and one which warrant this construction. There is one in 5 *Gra. 1.* but I will only mention *Case v. Maitland* reported in *Cra. Car. 2* 304, 305, but best in the latter. It was argued by the plaintiff that per mag. the trade or business of a drover, and the defendant was a bankrupt; verdict for the plaintiff in arrest of judgment; 1st, That it

at the plaintiff declared that he had used the
g and selling cattle, and divers times bought
but he is certainly mistaken; for if so the
could have arisen whether the plaintiff were
tutes of bankrupts: but it shews that *Croke*
drover ex vi termini meant a buyer and seller
ie case in point was an anonymous case deter-
court *Hil. 10 Geo. I.* on the stat. *5 Geo. I. c.*
ch was thus. An issue was directed out of
try whether *A.* were a bankrupt within the
at statute. The question at the trial was whe-
a *drover*. The witnesses at the trial proved
criptions of persons are concerned in this sort
1st, The person who buys the beasts in the
for whose account they are afterwards sold;
called the *jobber* or *dealer*; and it appeared that
description. 2dly, The person who actually
its to market, and who is usually a servant of
nd him (*a*) they called the *drover*. 3dly, The
lls the beasts at *Smithfield* for the jobber; and
les called the *salesman*. But the jury (*b*) were
at the first person above mentioned, called the
r, was the *drover* intended by the act. Serjt.
or a new trial, because the verdict was contrary
but the Court denied the motion, for none
krupst but one who sought his living by buying
d that before the late statutes where drovers
it was holden that drovers might be bankrupts;
urpose was cited the before-mentioned case of
1. And they said that a *drover* was not the
ie who bought and sold, as appeared from the
e-mentioned, *5 & 6 Ed. 6.* and *5 Eliz. c. 12.*
g found convenient that such drovers should be
prevent this inconvenience the exception was
statute *5 Geo. I.*, which must mean the same

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a strange construction of the act to say that this second de-
s was that which the Legislature meant to except. A per-
of a statute must be some person who, without such excep-
cluded in it: but a mere driver of the cattle of other per-
buys or sells them, is not within any of the bankrupt laws;
refore, when they excepted *drovers*, must have had in their
ething more than *drivers*.
direction of the learned Judge who tried the cause (it is pre-
question of law.

person

Ordered that the verdict should stand, and should be for the plaintiff.

N. The words of the statute are that no or drover, *as such*, can be a bankrupt; and Brother *May* very rightly observed that each be a bankrupt if he dealt in buying and selling commodities; and that it had been frequent in the King's Bench, particularly in the case of *Archer* (a) *Ad. 8 Geo. 1.* that a farmer might if he bought a great quantity (b) of hay and

(a) 3 *Mod.* 46; and 1 *Str.* 513.

(b) The rule established in later cases is that the extent is not so material as the intention of the trader, namely, to profit by buying and selling again to any person who applies to him for the commodity in which he deals; of which intention the jury are to judge. *Vaughan*, 1 *D. & E.* 572; and *Bartholomew v. Sherwood*.

M. 19 Geo. 2. GOODTITLE on the Demise of J
2. THOMAS CROSS against WODHULL
Thursday,
Nov. 21st.

[HIL 16 Geo. 2. Rol. 270.]

Devise to
"A for life,
and then to
his male
children for
their lives,
and after the

THIS ejectment was brought to recover
Broadlands and certain other lands in *Lincs*
demises were laid in the declaration, one
moiety by *Jeshua Cross*, another of the other
moiety by *Thomas Cross*, and the third of the whole

as; and on the trial a special verdict was found, containing these facts.

1745.

GOODTIE
THE
dem. CROSS
against
WODEVILL.

On the 4th of April 1674, *Joshua Cross*, LL. D. being in fee of the premises in question, by will devised as follows; "My will is that my eldest son *Joshua*, who is complete 24 years old, shall have my manor, &c.; my will is that my said son shall have and enjoy the said manor, &c. only for his life, and then the premises shall descend and come to his male children (if he have any) for their natural lives only, and to the male children descending from him; and upon their decease or failure, then my will is that the said remised estate in manor, &c. shall descend and fall to *Latimer Cross* and the heirs male of his body for the term of life and upon the same terms as I intended the same for my son *Joshua* and his male children; and in case of *Latimer's* and his male children their failure, then the said manor, &c. shall descend to my son *Thomas Cross* and his children for the same term of his and their life and upon the same terms: but if my said sons have daughters only, and the said premised estates descend thereupon to *Latimer* or *Thomas*, then my will is that the said manor, &c. shall be divided to and be equally divided between the daughters of *Joshua* and *Thomas* as to one moiety, and the daughter or daughters of *Joshua* as to the other moiety: but if they or any of them have no issue male or female then what was devised for or descended to the daughter or daughters of all any of them shall descend not to their cousins but my daughter *Rachael* and her lawful children: but upon the failure of my said four children and their lawful issue, then my will is that my nephew *J. Garlanland* and his children shall have the said manor and them and the lawful heirs of their bodies for ever the said manor, &c.—And my will further is that in case what was intended to my son *Joshua* fall to *Latimer*, then what was intended for *Latimer* shall come to *Thomas* and *Thomas* and his children; and my will also is that my son in the manor, &c. shall not be enjoyed by any of my sons until they shall accomplish the age of 25 years, or till my wife and trustees think fit they should sooner, &c. &c.

The donor died on the 1st of October 1676, leaving three sons, *Joshua*, *Latimer*, and *Thomas*. Soon after the donor's death *Joshua* entered; in Hilary term 1695, he suffered

1745.
 GOODTIL-
 TLE
 dem. CROSS
 against
 WOODHULL.

ferred a recovery, the uses of which were reserved to himself in fee; and on the 4th of *March* 1745, he had a son, leaving three daughters, *J. Sanby*, clerk, *Ann* the wife of *John Cross*, and *Elizabeth Cross*. On his death his lands were divided into bands of the two eldest and youngest of the devisee *Dr. Cross* respectively, claiming as heirs of *Joshua Cross* the devisee, the latter under the will of *Dr. Cross*. *M. 9 Geo. 1.* they all joined in a recovery, and declared the use under whom the defendants came towards on the 10th of *August* 1745, any children. *Thomas Cross*, the son of *Dr. Cross*, died on the 10th of *September* 1745, of his brother *Joshua* and after leaving two sons *Joshua* and *Thomas* plaintiff, who within five years died on the 8th of *December* 1742, premises in question.

The case was twice argued, for the plaintiff on the 31st of *October* 1745, by *Bosfield* Serjt. for the defendant and the second time by *Drape* 1745, *Willes* King's Serjt. for the latter 1745: and the two principal questions were, 1st, what estate *La* life or in tail; and the Court to questions. Another question was, whether or not the recovery supposition that he was tenant in fee, not being stated in the special verdict of 24 when the recovery was found, was in the course of the argument.

The opinion of the Court was

Willes, Lord Chief Justice (24) 1745, the last question was disposed of in the affirmative.

as to the other two points, I shall be very short in giving our opinion, both because I think they are very plain, and because all the doctrine relating to this matter is fully explained and all the cases thoroughly considered by the Court in a late case of *Ginger v. White*, in Trinity term 2 (a).

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GOOD TITLE
dem. CROSS
against
WIDOWS.

first; We are of opinion that *Joshua Cross*, the son of the devisor, took only an estate for life; for which I shall only three or four cases, none of which are so strong to warrant this construction as the present. *Archer's case*, 156; a devise to *Robert Archer* for life and to his next heir male; and the heirs male of the body of such heir male; it was holden to be only an estate for life. The case *Perk v. Day*, *Geo. Eliz.* 313. was exactly the same. as in *Wild's case*, 6 Co. 17. where it was held that if there be a devise to *A.* and his children, and there be no issue, it is an estate-tail of necessity, because it is a devise to the children by words de presenti: but a devise to *A.* after his decease to his children, it is only an estate for life.

Again in *Lodington v. Kime*, *Salk.* 224, there was a devise to *A.* for life without impeachment of waste, and in case he have any issue male then to such issue male and his heirs for ever; and it was held that issue must be taken as a singular, because of the devise to the heirs of such issue. So in *Rel. Abr.* (b), a devise to his eldest son for life or until he marries, and after his decease to the sons of his body; it was holden to be only an estate for life, by reason of the issue being non aliter. And lastly in the case of *Ginger v. White* which his lordship here read from his own note, *ut sup.* 348). the case of *Langley v. Baldwin*, 1 *Eq. Cas. Abr.* 185. is like the other case, and therefore it is no authority (c). With regard to the objections as to the absurdities that will follow; it is not to be supposed that the devisor knew them: but it is clear that he had it in his contemplation whether they should take effect as estates for life or in tail.

As to the second point, what estate *Latimer Cross* took; the reason of the thing points out that he should only have

Ginger d. White v. White, *sup.* 348.

1 *Rel. Abr.* 837. pl. 13. This case is not so stated in *Rel. Abr.*; but *Black* thus cited it in 1 *Ventr.* 231, and said that *Rolle's* account of it was correct.

See the observations on this case in *Ginger v. White*, *sup.* 358.

1745. an estate for life. Besides the old rules in *Co. Lit. (a)* and *1 Rol. 838* and *839*, that where a man gives an estate to one and his heirs or the heirs of his body, and another estate to another in formâ prædictâ, or remainder to another in formâ prædictâ, he shall have the same estate. The case of *Lou v. Davies*, *M. 3 Geo. 2. B. R.* in *2 Lord Raym. 1561. (b)*, is also in point: that was a devise to *Benjamin Jeven* and his heirs lawfully begotten, that is to say, his first, second, third, and every son and sons successively lawfully to be begotten and the heirs of their bodies, &c.; and it was holden an estate for life.

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THE
dem. CROSS
against
WODKULL.

The attempt to explain the first clause in this will by the second, and to consider it as turning the first estate into an estate-tail, was a very ingenious attempt, and the best argument that could be used: but it is plainly without any foundation; for the words of the second clause are "to *Latimer* and the heirs male of his body, for the same term of life and upon the same terms as I intended the same for *Joshua* and his male children:" but those terms were "to *Joshua* for life and to his male children for their natural lives only, and so to the male children descending from them." If the deviser had known the sense of the words "heirs male," and had intended an estate-tail by it, he certainly would have inserted them in the first clause. Besides, the words in the other devise, to *Thomas*, plainly exclude any such supposition.

We are therefore of opinion that the judgment may be entered up generally for the plaintiff on all the demises in the declaration."

(a) *Co. Lit. 20. b.*

(b) *2 Str. 849; Fing. 112. S. C.*

M. MYDDELTON *against* Sir WATKIN WIL-
LIAMS WYNN, Bart.; in Error.

[Hil. 16 Geo. 2. Rol. 868.]

1745, 6.

H. 19 Geo.
2.

Tuesday,
Feb. 11th.
Exchequer
Chamber.

THIS was an action on the case, brought on the stat. 7 and 8 W. 3. c. 7. in the Court of King's Bench against the defendant below (the plaintiff in error) Sheriff of the county of Denbigh for a false return of a member of parliament for a county. The declaration, after setting forth the issuing of writ and the delivery of it to the defendant below, declared that at the election the plaintiff below (Sir W. W. Myddelton) and John Myddelton were candidates, and that the defendant was duly elected, yet that the defendant wilfully maliciously and injuriously intending to injure and oppress the plaintiff and to hinder him from his place in parliament did declare him to be elected but voluntarily maliciously and negligently neglected and refused so to do, and after the said election wilfully falsely maliciously and injuriously contrary to the duty of his office and contrary to the form of the statute, returned J. Myddelton; whereas in truth J. Myddelton was not elected but the plaintiff below was duly elected; and whereas J. Myddelton ought not, but the plaintiff below ought, to have been returned. The plaintiff then alleged that after the said return several petitions of several freeholders of the county, and also a petition of the plaintiff (Sir W. W. Wynn), were presented to the House of Commons, severally complaining of an undue election and requesting that the House, having proceeded thereupon, resolved that Sir W. W. Wynn ought to have been returned, and ordered the clerk of the crown to amend the return by striking J. Myddelton's name and inserting in its stead that of Sir W. W. Wynn, which amendment was accordingly made; and the House also ordered that the further hearing of the matter of the several petitions should be discharged, and that J. Myddelton should be at liberty to petition the said House touching the election within fourteen days then next if he maintained or should think fit, but that J. Myddelton did not within that time petition the House touching the election; by reason of which premises Sir W. W. Wynn was prevented taking his seat in parliament for seven months, and was put to great expense, &c.

The stat. 7
& 8 W. 3. c.
7. giving an
action for a
false return

of members
of parliament is a
remedial
act; and the
venire facias
may be de
corpore com-
mitatus.

—If a declara-
tion on a
statute con-
clude contra
formam
statuti, the
judgment
need not.

—The judgment
in an
action on
the case on
statute by
the party
grieved may
be in misericordi-
a; but
even if such
a judgment
were wrong,
it is cured
by the sta-
tute of jeo-
fais.

—An action
may be
on the stat.
7 and 8 W.
3. c. 7. for
a false return
of members
of parliament, tho'
there be no

—Vid. 1
mination of the House of Commons on the right of election for that place
125. S. C.

The

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TON
against
WYNN,
Bart. in er-
ror.

The defendant pleaded the general issue; and on the trial the jury gave a verdict for the plaintiff with 1400*l.* damages, which together with the costs (being doubled) amounted to 3214*l.* The judgment was accordingly entered up for that sum; and the defendant below *in mercy*, &c.

A writ of error was brought in the Exchequer Chamber, where (besides two particular errors, which were afterwards cured by amendments in the King's Bench, *vid.* 2 *Ser.* 1227.) five objections were taken to the record on behalf of the plaintiff in error. The case was argued three times, the first time by Sir *R. Floyd* for the plaintiff in error and Sir *T. Boote* for the defendant, the second time by *Prime* King's Serjt. for the former and the Solicitor-General for the latter, and again by *Evans* for the plaintiff and the Attorney-General for the defendant; but after the first argument the two first objections appear to have been given up.

After the Court of Exchequer-Chamber had taken time to consider of the case,

Willes Lord Chief Justice *C. B.* delivered his own opinion and that of his Brethren, (except Mr. *J. Fortescue* *Aland* who was absent,) as follows.

"There are two particular errors assigned, besides the general errors, that there was no venire and no distringas; but they being both returned on the second certiorari, these two errors are answered, so that the case now comes before us only upon the general errors assigned.

And five objections were taken by the counsel for the defendant, the plaintiff in error; one to the process, two to the entering up of the judgment, and two on the merits.

As to the first error. It is that the venire facias which is now returned is *de corpore comitatus* instead of *de vicineto*; for though the 4th and 5th *Ann. c.* 16. *s.* 6 and 7. say that every venire facias for trial of any issue in any suit shall be awarded of the body of the county where such is triable; yet there is a proviso in this act that it shall not extend to any action

on any penal statute; that this was an action on a 1745, 61
 al statute, and therefore plainly within the proviso. So
 a question hath been whether this be a penal statute or
 But I shall give it another answer, that supposing it a
 al statute, yet it is cured by statute 16 and 17 Car. 2. c. 1.
 which makes good a judgment after verdict, though the
 as is wrong laid. But then it is said there is the same
 of proviso in the statute Car. 2. that it shall not extend
 ctions on penal statutes, so that the objection still re-
 ns: but we think this not a penal statute, but for this
 ose to be considered as remedial. And we likewise
 k that this is cured by the 5 Geo. I. c. 12. which enacts
 no judgment on a verdict shall be reversed or stayed for
 defect either of form or substance; and it is certain that
 must be a defect either of form or substance, and there-
 within this act (e).

MYDDEL-
 TON
 agat:
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 in Error.

The second objection is to the form of the judgment, and
 next to form and substance. It is objected that the
 ment doth not conclude contra formam statuti; we
 considered this both on the footing of precedents and
 reason. As to precedents they are both ways; therefore
 adding of those words could not have vitiated. But
 question is whether it was necessary to put them in.
 be sure in point of reason, there is no occasion. In-
 l if the declaration had not laid the offence to be contra
 nam statuti, the judgment must be ill; because it would
 have been an action on the statute, but at common law;
 efore a judgment for double damages would be wrong.
 : defendant hath pleaded not guilty as to the whole charge
 he declaration; therefore he hath said that he is not
 ty of a fact contra formam statuti; the issue was on this
 , and the jury have found him guilty of making a false
 urn contra formam statuti; the judgment hath pursued
 verdict; and therefore we think this objection of no
 ght.

) See also *Merrick v. The Hundred of Offshone*, Andr. 118, 119; and
de quitam v. Wiltshire, 2 Str. 1085. And now all doubt on this point is
 ved by the stat. 24 Geo. 2. c. 18. s. 3. which, after reciting the inconve-
 ces arising from the proviso in the stat. 4 & 5 An. c. 16. enacts that every
 re facias in any action or information upon any penal statute shall be
 ind of the body of the proper county where such issue is triable.

The

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TON
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The third objection is to the judgment, which concludes that the defendant is in *miseriordia* instead of *capiatur*; and this is an objection to the substance as well as to the form. The answer given to it was that the entry was right: but even supposing it wrong, yet it is cured by the statute of jeofails. We are not all of us certain that this judgment is right, but the greater part of us think it is. This is an action on the case, which is to recover damages to the party grieved, and there the proper judgment is in *miseriordia*; and the cases in which it should be by *capiatur* is where there is a fine to the King, as in trespass, &c.; I mean that at common law there should be a *capiatur*. But we are all of opinion that supposing the judgment bad, yet it is cured by the statute of jeofails. Yet notwithstanding I shall mention some cases to shew where a *capiatur* is necessary, and where not, and on which we found our opinion that this entry of the judgment is good. The first is in 1 *Roll. Ab.* 222. pl. 11. where it is said that in actions of trespass upon the case the entry of the judgment shall be in *miseriordia* and not *quod capiatur*. The next is an action on the stat. of *Edw. 6.* for not setting out tythes; *ib.* page 223. pl. 17. So in debt on 1 and 2 *Pb.* and *Mar.* for t. king 10d. for a distress instead of 4d., by which he became liable to a penalty of 5l.; the Court held that the judgment ought to be in *miseriordia*. *North v. Wingate, Cro. Car.* 559, 560. So in *Plowd.* 118, 130, where the action was on the stat. 23 *H. 6.* the judgment was in *miseriordia*. The case of *Waterhouse v. Bawde, Cro. Jac.* 134. also shews that where the action is brought tam pro rege quam pro seipso the King is to have a fine, but not where the action is brought only for the party; and where there is no fine to the King, the judgment should not be *quod capiatur*. As to the stat. 5 and 6 *W. and M. c.* 12. which takes away the *capiatur* fine in actions vi et armis; that does not apply to the present case any otherwise than as it explains the rule laid down here; for that takes it away in all actions vi et armis, which are the only actions in which it was used, and it shews the sense of the Legislature that they thought in trespass on the case *miseriordia* was the proper entry (a).

(a) See also *Pullin v. Sikes*, 2 *H. Bl. Rep.* 312; *Hamble v. Blund*, in error. 6 *D. & E.* 255; and *Jenkinson v. Bates* qui tam; in error; and *ib.* 257.

But

But another answer may be given to this objection, that supposing this judgment wrong, yet it is aided by the stat. 16 and 17 Car. 2. c. 8; only indeed there is an exception of actions on penal statutes; therefore if this be considered as an action on a penal statute, this objection is not aided. But we are all of opinion that this statute, which gives damages to the party grieved, though they are double damages, is a remedial act, because the damages are to be considered only as a satisfaction to the party. And this seemed to be the opinion of the Court of King's Bench in the case of *Philips v. Smith*, Cam. Rep. 284, 5, in an action against a person for refusing to deliver a poll, in which case a penalty of 500*l.* is given. We think this is likewise cured by another statute, at least this statute serves to explain the sense of the Legislature on the stat. 16 and 17 Car. 2. This is the 4 Geo. 2. c. 26. for turning the law proceedings into *English*; for in it is enacted that every statute for amending jeofails shall extend to all forms and all proceedings in courts of justice, *except in criminal cases*, when the forms and proceedings are *English*; and it concludes thus "And this clause shall be taken and construed in the most ample and beneficial manner for the ease and benefit of the parties, and to prevent frivolous and vexatious delays." So that supposing the act, on which this action is brought, is either penal or remedial, as it is not a *criminal prosecution*, the defect is aided; for the action in the stat. 4 Geo. 2. must either be considered as an acting clause, or as declaratory of the sense of the Legislature on the word "penal" in former statutes, and that by it they meant only *criminal prosecutions*. As to these points we are all of the same opinion.

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TON
against
WYNN,
Bart. in Ex-
cor.

Now I come to the fourth and fifth objections on the merits of the case; and as to these we are all of the same opinion, except my Brother Abney; and he only doubts, for if we were clearly of a different opinion, our opinions would be given seriatim. And he doubts whether this action is maintainable; for he says that this action can be brought only in two instances; 1st, When the return is made contrary to the last determination of the House of Commons of the right of election for such place; 2dly, Where any officer fully falsely and maliciously makes a double return, therefore as this is not an action for a double return, nor

1745, 6. nor for making a return contrary to the last determination of the House of Commons, he thinks it is not maintainable.

MYDDLE-

TON
against
WYNN,
Barr. in Er-
ror.

I will first state the act of parliament: and then I will give the opinion of my Brothers (except my Brother *Abney*) and their reasons for it, in which I entirely concur with them; and afterwards some further reasons of my own, in which I have no authority to say that any of them agree with me. The stat. 7 and 8 *Wm. 3. c. 7.*, which is intitled "An act to prevent false and double returns of members to serve in parliament," enacts and declares (sect. 1.) that all false returns wilfully made of any knight of the shire, citizen, burghers, baron of the cinque ports, or other member to serve in parliament, are against law, and are thereby prohibited; and in case any person or persons shall return any member to serve in parliament for any county, city, borough, cinque port or place, contrary to the last determination in the House of Commons of the right of election in such county, city, borough, cinque port or place, *such return* so made shall and is thereby adjudged to be a false return. The second clause enacts that the party grieved, to wit, every person who shall be duly elected to serve in parliament for any county, city, borough, cinque port or place, by *such false return* may sue the officers and persons making or procuring the same, and shall recover double the damages he shall sustain by reason thereof, together with his full costs of such suit. And, to the end that the law may not be eluded by double returns, it is enacted (by sect. 4.) that if any officer shall wilfully falsely and maliciously return more persons than are required to be chosen by the writ or precept on which any choice is made, the like remedy may be had against him or them by the party grieved. And then the sixth clause enacts that all actions grounded upon that statute shall be brought within two years after the cause of action arises.

The fourth objection is that double damages are only given in case of a return made contrary to the last determination of the House of Commons. It is said that the words *such false return* mean only such return as was contrary to the last determination in parliament: but this may receive several

wers. But in order to understand the meaning and 1745, 6.
 this act, it will be necessary to consider the title and
 le and every part of it. And to be sure it appears ^{MYDDLE-}
 title as well as preamble that this act was made in or- ^{TON}
 give a remedy for *all* false and double returns. And ^{against}
 ik the word *such*, even considered grammatically, must ^{WYNN,}
 o all that went before, otherwise other words would ^{Bart. in Er-}
 en inserted which are not here. Besides it would be ^{ror.}
 to construe it otherwise; for suppose an act of par-
 shall begin with saying, that stealing *all* cattle is felo-
 d lest any doubt should arise on the meaning of the
 "cattle," it should afterwards say that *sheep* shall be
 red as *cattle*, and then enact that all *such* stealing shall
 ny without benefit of clergy, would it not be absurd
 hat the word *such* should relate only to *stealing sheep*?
 l absurdities and injuries would follow from the plain-
 onstruction of this statute, and that ought carefully to
 ided in the construction of acts of parliament. If the
 "such" did not relate to *all* false returns wilfully
 a person could only have a remedy for such returns
 e made contrary to the last determination in parlia-
 whereas the remedy was intended to be general; and
 at seldom happen, be the return never so false and ma-
 , that it is a return contrary to the last determination
 House of Commons. According to that construction
 ning officer who returned a person who had only two
 instead of him who had ten, would not be liable to
 ion, if there were no determination by the House of
 ions. But this is certainly such a false return for which
 t intended to give a remedy; and to determine other-
 would be to make the remedy partial when the act
 ed it should be general. Another circumstance, which
 that this act extends to all offences of this nature, is
 is to extend to *all counties &c.*; whereas the determin-
 s of the House of Commons, generally speaking, are
 tions for *boroughs* with respect to the right of voting.
 ve think an answer to this objection.

e fifth objection is that it does not appear by the de-
 on that this petition hath been determined in the House
 mmons, but may yet come in question, and from
 thence

1745, 6. thence it is argued that the Courts of *Westminster-Hall* ought not to proceed in actions of this nature, while there is the least possibility of the same question coming before the House of Commons, because there may be a clashing in the determinations, and they are the proper Judges of their own elections. I must admit that, if it be necessary to set forth such a previous determination, no such determination appears in this declaration, for it is only said that they determined the return to be wrong, and therefore ordered the names to be altered; and it is plain that this was only a determination that the return was wrong, not that it was *false*; and it might be wrong without being false; as for instance, if it had been made by a wrong person; and by the liberty given to *J. Myddelton* to apply again within fourteen days it seems that the merits never came in question. We cannot here take notice of the rules of the House of Commons in proceedings of this nature, and therefore cannot conclude, because *J. Myddelton* did not apply within the fourteen days given to him, that therefore he was concluded. There are four persons, who might bring these petitions. 1st, The voters for Sir *W. Wynn*. 2^{dly}, Sir *W. Wynn* himself. 3^{dly}, The voters for *J. Myddelton*; 4^{thly}, *J. Myddelton* himself; and we cannot judicially take notice, but that the right of election was put off.

Then as it does not appear by the declaration that there was a previous determination in the House of Commons, the question now is whether it be necessary that there should be any such previous determination. The cases cited to shew that it is necessary are most of them little to the purpose. The first is the case in *Plowd.* 118. That was an action on the stat. 23 *H. 6.*, which is worded in quite a different manner from the present: but if this case had any weight, it is rather an authority for our opinion, because no such previous determination was there set forth; and though the case was very strenuously argued, this objection was not taken. The next is *Nevill v. Stroud*, 2 *Sid.* 168. but there no judgment was given by the Judges in the Exchequer, who were all assembled there for that purpose; and, as it is said in 3 *Lev.* 30., it was adjourned into parliament propter difficultatem, and slept there without any determination; so that case is of no authority one way or the other. The case

bernadiston and *Some*, 2 *Lev.* 114. was an action for a 1745, 6. double return, three of the Judges held that it lay, and one was reversed; error was brought on this in the Exchequer Chamber, and that judgment was reversed (a). But that an action for a double return, and not for a false one; (as is said) it does not affect the present case, though I own I do not understand the distinction laid down in that between a false and double return as to the actions lying not lying at common law, where it is alleged (as is in that case) that the return was made *falsely and maliciously*. However that was an action at common law, so it likewise resembles the present case. The case of *Onslow v. Spley*, 3 *Lev.* 29. was an action for a double return, and founded on *Bernadiston's* case, and it was there holden that an action lay not: but that case proves too much, for it was said that it would be presumption to meddle with elections before they had been determined in parliament. The case, when it was cited at the bar, staggered us all, of *Prideaux and Morice*, 1 *Lutw.* 82 to 89. *Salk.* 502. *Farrelly* (b) 13 and 14. I believe every one imagined it when it was cited that that was an action on this statute, but on looking into it we find that that was not an action on the statute, but at common law; 1st, Because by the pleadings which are in *Lutwich*, it is not laid to be contra factum; 2dly, Because by the arguments it appears that it is an action at common law; and this entirely altered our notion of the present case. There are things in Lord Trevelyan's argument in the Common Pleas, and Lord Holt's in the King's Bench, strong as to this point. Lord Trevor refused to give his opinion that an action for a double return did not lie at common law: but they were all clearly of opinion that there ought not to be an action at common law before there had been a determination in parliament. The reason given both by Lord Trevor and Lord Holt is, that if there might be different determinations, and the House of Commons are the proper Judges of their own elections. If this were a determination on the 7 & 8 W. 3. objection would be great; but as it is not, that authority has an end at once; because it is certain that an act of par-

MYDDEL-
TON
against
WYNN,
Bart. in Er-
ror.

And that judgment of reversal was afterwards affirmed in the House of Commons.
Vid. 1 *Lutw.* 89.
7 *Mod.* 13.

1745, 6. liament may give the Courts at *Westminster* a jurisdiction in cases of this nature, though they had none at common law, because the House of Commons is party to every act and therefore is bound by it. But we think the argument made use of by the Judges in that case makes against this objection in the present. It was there objected that an inconvenience would arise, as there might be a clashing of determinations: the answer was, where an act of parliament gives a jurisdiction, we may exercise it in all cases. This shews that they did not consider this on the act of parliament; for if they had, this objection would not have held at all. I have here a report of the determination of the House of Commons in the case of *Alby* and *White*, which says that the House of Commons have a right to determine their own elections, except in cases particularly provided for by act of parliament; and it would be great inconvenience if it were otherwise.

MYDDEL-
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against
VYNN,
Part. in Er-
sor.

On this point I give no opinion of the rest of the Judges, but speak this as my own opinion only; though it has never yet been determined, I should have no doubt but this action would lie at common law; and it would be a reflection on the law to say it would not, because here is certainly *damnum cum injuria*, which by the policy of the common law ought to have some remedy (a). But the construction contended for by the plaintiff in error would overturn this whole act of parliament, as it would deprive the party even of having an action on this statute; for the action must be brought within two years after such false or double return made; and therefore if this action is not to be brought until the matter is determined in parliament, they might keep the petition so long depending, that the time for bringing the action would be expired, and then the party would be without remedy. With regard to the case of *Prideaux v. Morice*, which was much relied upon: I cannot (speaking for myself only) hear it mentioned, without entering my protest against that part of the determination, which says that the determinations of the House of Commons shall be final and conclusive on the Courts of *Westminster-Hall*. 1st, Because

(a) Vid. *Alby v. White*, 2 *Ld. Raym.* 938; *Passey v. Freeman*, 2 *D. & L.* 51. &c.; and *Winmore v. Greenbank*, *sup.* 577.

method of trial there is different from that in *Westminster*- 1745, 6. //; had they the same authority to inquire into those ^{cases} that we have, I should be content. Next they do ^{MYDDEL-} make their determination on oath, whereas we are ^{TON} ^{against} ^{WYNN,} ^{Bart. in Er-} ^{ror.} to determine according to right; they cannot try juries; nor can they examine the witnesses on oath.

As to the objection of clashing in jurisdictions; that does hold, unless their determinations were in idem. In- d would an affize or ejectment lie for a seat in the House Commons, and were we to determine one way and y another, there might be said to be a clashing; but e we determine on that which they cannot; for though y may determine as to the right of sitting there, yet are the only persons who can give damages. I shall one common instance; suppose an action of trespass and ult is brought and an indictment for the same assault brought in another court; in one the defendant may found guilty, in the other he may be acquitted; it is possible; that he may be found guilty and uitted before the same Judge for the same offence, as ere the same Judge of Nisi Prius sits at both bars; and there would be no clashing in these determinations, for determines on different evidence; in one case the party self may give evidence, in the other not. So it may be cases of wills, where lands and personal estate are dispos- of by the same will, and the party goes into the Ecclesi- ical Court to establish the will as to the latter, and comes o the Courts of law to establish it as the former, and the estion in both Courts is, whether the testator were com- or not; the Ecclesiastical court may hold it good as to : personal estate, and these Courts hold it bad as to the real, l yet there would be no clashing of jurisdiction, because : determination would not be ad idem, and there no doubt ld arise which judgment to execute. Another reason y the Courts of *Westminster* should not be concluded is,

a) But a tribunal has been since constituted for the determination of con- ed elections by a select committee of the House of Commons, who are nselves sworn to determine according to the evidence, and who have the ret of sending for and examining witnesses on oath. Vid. stat. 10. Geo. 3. 6; and 11 Geo. 3. c. 42., both made perpetual by 14 Geo. 3. c. 15.; and amended by 25 Geo. 3. c. 84; 28 Geo. 3. c. 52; 32 Geo. 3. c. 1; and 36 . 3. c. 59.

that

1745, 6. that it is a rule that no determination between any two persons can be conclusive as to a third; now the determination in the House of Commons is only between the two members; here it is between one of the members and the sheriff, who is a third person. I shall mention but one reason more, which is that the greatest injury of all might by this means go unpunished; for it may happen, and frequently has happened, that a man has been so impoverished by the expences of his election, that he has not money enough left to bring his petition before the House, and yet till he does bring his petition he will be denied the only means he has of reparation, bringing his case before the Courts of *Westminster-Hall* in order to recover damages. These I mention only as my own private reasons.

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TON
against
WYNN,
Bart. in Er-
ror.

But we are all of opinion that supposing this previous determination in the House of Commons not here set forth and that it ought to have been set forth originally, yet it is cured after a verdict (a); for as the jury have found for the plaintiff, we must presume that proper evidence was given to induce them to find this verdict, otherwise the Judges would have directed them otherwise.

So the judgment must be affirmed."

(a) Vid. *Macmurdo v. Smith*, 7 D. & E. 518., and the cases there referred to.

H. 19 Geo. 2. The Mayor Bailiffs Burgeffes and Commonalty of
Lucday, BEDFORD against The Bishop of LINCOLN and
Feb. 12th. WILLIAMS.

[M. 17 Geo. 2. Rot. 1726, 1727, 1728, 1729.]

A quare im-
pedir may be
brought for
a church and
an hospital.
IN quare impedit, the plaintiffs in their declaration alleged that they were, and for a long time past had been, seised of the advowson of the church of *Saint John the Baptist* and the hospital of *Saint John* in *Bedford* as in gross as of fee and right, and being so seised they presented to the said church and hospital, being vacant, one *J. Towersey* their clerk, who upon the presentation of the said mayor bailiffs burgeffes and commonalty was admitted instituted and inducted into

the same in the time of Queen *Anne*; and that the said
 or bailiffs, burgesses and commonalty being so seized, the
 church and hospital afterwards became vacant by the
 death of the said *J. Towersey* and still is vacant, &c.

1745, 6.

The Mayor
&c. of BED-
FORDagainst
The Bishop
of LINCOLN
and WIL-
LIAMS.

The Bishop in his plea claimed nothing in the said church
 in the advowson thereof, but the admission institution
 induction of parsons to the same church, &c. and other
 rights which belong to the ordinary as ordinary of the same
 church and church.

The defendant *Williams* put in three pleas. 1st, After
 telling that the mayor, &c. were not seized at the time
 when *Towersey* was admitted, &c. he admitted that *Towersey*
 the presentation of the mayor, &c. was admitted instituted
 inducted into the said church and hospital in the time
 Queen *Anne*, and that after his admission *Towersey* died,
 but he pleaded that the said church and hospital at the
 time of that admission and from time immemorial had been,
 still were, a lay fee and estate and not presentative.
 then alleged that before *Towersey's* admission and before
 said mayor, &c. had or claimed any thing in the church
 hospital King *Henry* the Eighth was seized in his demesne
 of fee of and in the said hospital, to which the said church
 was and from time then immemorial had been and still
 appurtenant, in right of his crown; that on his death
 said hospital, to which, &c. descended to King *Edward*
Sixth, and on his death to Queen *Mary*, and on her death
 Queen *Elizabeth*, who on the 20th of *July* in the 18th
 of her reign by letters patent granted to the said hospital,
 which, &c. by the name of *Saint John's Hospital* and all
 lands tenements rents services and hereditaments what-
 ever with their appurtenances to the said hospital belong-
 or appertaining to *J. Farnham* in fee. The defendant
 his plea then deduced a regular title to the said hospital,
 which, &c. from *J. Farnham* to *G. Williams* the defend-
 ant's father in fee in 1678; and then set forth that the said
Williams being so seized the said mayor, &c. on the 14th
 of *April*, 13 *An.* unjustly and without any judgment
 seized the said *G. Williams* thereof, whereby the said mayor,
 were seized of the said hospital to which, &c. with the
 appurtenances by that disseisin, and being so seized thereof

R r

by

1745, 6. by that disseisin they pre-

saïd church and hospital, a

tative, who on the present

admitted instituted and ind

and hospital presentative; 1

seised of the saïd hospital,

the saïd *G. Williams*, the

the 1st of *May* 1724 re

which, &c. with the app

in his demesne as of fee as

being so thereof seised he

afterwards on the 1st of *J*

estate of and in the saïd h

purtenances, upon whose d

with the appurtenances de

and heir, whereupon the d

pital to which, &c. with th

is seised thereof in his deme

The second plea was pre
out, except that it spoke
every expression relating 1

In the last plea the defens
or, &c. at the time of the
of *J. Towersey* into the sa
about the hospital) were 1
saïd church, &c. pleaded th
immemorial had been an
that before and at the ti
defendant was seised of a
the saïd church as in fee
defendant had, being so fe
of the saïd church from ti
church became vacant had
ought to give the saïd chur
clerk for the term of his l
being then vacant it belong
and confer the same &c.

In answer to the bishop
the church or advowson bi

and said nothing in particular concerning the hospital, the 1745, 6.
 Plaintiffs prayed judgment and a writ to the bishop, &c.;
 upon which it was adjudged that the plaintiffs should recover The Mayor
 their presentation to the said church and hospital against the &c. of Bzr-
 bishop, &c.; with a stay of execution until the pleas between Ford
 the other parties were determined. against
 The Bishop
 of LINCOLN
 and WIL-
 LIAMS.

To the first of the other defendant's (*Williams's*) pleas the plaintiffs replied that at the time of the admission institution and induction of *Towersey* into the said church and hospital the same church and hospital were and still are presentative and not a lay fee and estate, as in the plea is alleged. To the second plea that the said hospital at the time of that admission, &c. was presentative and not a lay fee. And to the third plea that the church at the time of *Towersey's* admission was and still is a church presentative and not a church donative.

To these replications the defendants demurred generally.

After three arguments at the bar, on *Wednesday, February 1st, 1743, April 28th, 1744, and Tuesday, November 13th, 1744.*

The Court on this day gave

Judgment (a) for the plaintiffs.

(a) The grounds and reasons of this judgment do not appear in the Lord Chief Justice's note books or papers: but the following account is taken from Mr. J. Abney's note book.

After many arguments at the bar, 12th of February 1745 the plaintiffs had judgment.

The Court resolved that the objection, that no quare impedit will lie for a church and hospital, because the one is ecclesiastical and the other temporal, is an objection of no weight, and the saying in *Ld. Raym.* 199 is a dictum only. A rectory and vicarage are of a different nature. But in this declaration it appears that the church and hospital are one and the same thing. And *Rast. Err.* 506. b. is a good precedent. In *Co. Lit.* 342. *Register* 31 (A), stat. 2. c. 5. f. 4. *Finn. N. B.* 34 (E), are great authorities that a quare impedit will lie for an hospital, and that it may be presentative. And for these reasons the Court held the declaration in the case at bar to be good.

As to the pleas of the defendants, they are bad. In a quare impedit it is necessary for the plaintiff to allege one presentation in himself or those under whom he claims. A seisin and a presentation are necessary, which are the plaintiff's possession; and it is equally necessary for the defendants to traverse one of them. But in these pleas the defendants have confessed the presenta-

1745. 6.

The Mayor
 &c. of Bz-p-
 Ford
 against
 The Bishop
 of LINCOLN
 and WIL-
 LIAMS.

tation, and endeavoured to avoid it but not traversed, for a p
 no traverse: besides the pleas have separated the church from
 which are one entire thing; and one plea cannot be taken in a
 The pleas are also defective, because the defendant *Williams* has n
 sentation or title either in himself or those under whom he claims.
 The Court inclined to think that the replicat ones were good,
 the three pleas; but they founded their judgment on the validity
 tiff's declaration and the defects in the defendant's three pleas
 ny J.

E. 19 Geo. 2.
 Monday,
 April 21st.

THOMAS DAVIES on the Demise of JOHN
 against WILLIAM HAMLIN, an Infant,
 Guardians, and others his Tenants.

A. having
 an only child
 B. (a daugh-
 ter) devised
 lands to a
 child with
 which his
 wife was
 then enfeoffed,
 if a male;
 but if a fe-
 male, then
 the lands
 were to be
 divided be-
 tween B.
 and that fe-
 male; and
 if they both
 died without
 issue, then
 to C. in fee
 —The child
 was after-
 wards born,
 and was a
 male: held
 that he took
 a fee, either
 by the will
 or by de-
 scent.

“ IT came before the Court upon a case refer-
 Brother *Burnett* at the *Suffex* assizes held at
 the 10th of *August* 1745.

William Hamlin, being seised in fee of the pre-
 question, by his will dated the 24th of *April* 1662
 them in the following words; “ I give my free
 lying in the parish of *Ardingly* and *West Hoactly* (1
 premises in question) unto the issue of my wife
 now travaileth withal, in case it be a man child;
 happen to be a woman child, then my will is that it
 equally divided between my daughter *Elizabeth* and
 child which my wife now travaileth withal; and if
 happen that my daughter *Elizabeth* shall die witho-
 then the child that my wife now travaileth withal shall
 enjoy the said land: but if it shall happen that they
 without issue, then my will is that *Thomas* and
Tully, sons of my brother *John Tully*, shall have
 parcel of land to them and their heirs for ever.”
 visor died a few days afterwards leaving his wife
 who was brought to bed of a son in *July* 1662
William, and who was his only son and heir at law
 entered, and being seised and possessed of the pre-
Hilary term 1692 levied a fine sur conuſance de droi-
 ceo, &c. to the use of himself and his heirs; and by
 dated the 17th of *August* 1741, duly executed, de-
 premises to the defendant *William Hamlin* and his be-
 died without issue in the month of *December* 1743, having

sion of the premises from his birth until the
 his death; and upon his death the defen-
 his devisee, entered on the premises and hath been
 sion ever since. *Elizabeth* the sister died without
 ie life-time of her brother. *Thomas Tully* died in the
 of his brother *William*; and afterwards *William* died
 issue in the lifetime of *William Hamlin* the son,
John, the lessor, his son and heir, who after the
William Hamlin the son on the 25th of *April*
 de an actual entry on the premises in order to avoid
 and made a demise of the premises to the plaintiff.

1746.

DAVIES
 dem. TUL-
 LY
 against
 HAMLIN.

uestions reserved were.

Vhether *William Hamlin* the son were seised of an
 fee-simple in the premises.

If he took a less estate, whether the fine above
 d discontinued the remainder limited to *Thomas*
iam Tully, and took away the entry of the lessor
 laintiff.

the first question (a), I, my Brother *Abney*, and
 ier *Burnett*, (absent Mr. J. *Fortescue A.*) were all
 f opinion that *William Hamlin* the son was seised
 late in fee-simple. For the devise over to the sons
am Tully was only in case (b) the issue of his wife,
 ie then travailed with, was a woman child: if it
 male child, as it was, the devise to *Elizabeth* his
 and the devise over to the sons of his brother never
 ce at all. It was therefore quite immaterial what
William the son took by the will, whether an estate
 in tail, or in fee-simple, because as soon as he was
 whatever estate did not pass to him by the will descend-
 1 as heir at law to his father, as being an interest
 d of.

is so clear upon the face of the will that there was
 on to cite any cases at all, or to take notice of any
 which were cited. And this being so clearly with
 dants, there was no occasion to give any opinion
 cond point reserved."

case was argued by *Wynne* Serjt. for the plaintiff and *Prime* King's
 e defendants.

Roe v. Wickett, Hil. 15 G. 2. sup. 303.

Sir

1746.

E 19 Geo. 2.
Tuesday,
May 6th.

Sir P. T. CHETWODE, Bart. against J. CREW, J.
KIDD, and G. STAUNELEY.

[HIL 16 Geo. 2. Rol. 149.]

A Court
baron can-
not be hold-
en without
two free-
hold tenants
of the ma-
nor.

—Such free-
hold tenants
cannot be
created at
this day.

—If the
lord now
convey part
of the de-
mesnes of
the manor
to A. and
his heirs
and other
part to B.
and his
heirs, to
hold as of
his manor
by fealty
and suit of
court, and
then hold a
court before
those two
tenants as
free tenants,
the court is
improperly
holden, and
an amerce-
ment at that
Court is
consequent-
ly bad.

IN replevin for taking the plaintiff's saddle in a place cal-
led the Stable at *Oakley* in the county of *Stafford*, the
defendant *Crew* avowed, and the other two defendants ac-
knowledged, the taking as a distress for not doing suit at
the defendant *Crew's* Court in five different avowries.

In the avowry it was stated that the plaintiff was seized of
an ancient messuage with the appurtenances in *Oakley*, where-
of the place in which, &c. is and at the said time when, &c.
and also time immemorial was parcel, in his demesne as of
fee, and held the said tenements, &c. of the defendant, *J.
Crew*, as of his manor of *Muckleston* by fealty and the
yearly rent of 3s. payable at the feasts of *Saint John the
Baptist* and *Saint Martin the Bishop* in the winter by equal
portions, and also by the service of doing suit at the Court
of the said manor holden and to be holden from three weeks
to three weeks within the same manor, which said services
and rent the defendant *Crew* was seized by the hands of the
plaintiff as by the hands of his very tenant, to wit, of the said
fealty and suit of Court as of fee and right and of the rent
aforesaid in his demesne as of fee; and because the said suit
of Court at a Court of the defendant *Crew* of his said ma-
nor held, &c. on the 23d of *September* 1740 was not done
and performed, the defendant *Crew* in his own right and
the other two defendants as his bailiffs acknowledged the
taking, &c. for the said suit at the said Court so undone and
unperformed, &c.

The three next avowries only differed from the first in
respect to the rent; in the second it was alleged that the rent
was payable yearly at *Saint Martin's the Bishop*; in the third
that it was payable half yearly at *Lady-day* and *Michaelmas*;
and in the fourth at *Michaelmas* only. The fifth and last
avowry alleged that the parcel where, &c. was parcel of
an ancient messuage with the appurtenances in *Oakley*, and

was

and from time immemorial had been holden (among things) of the manor of *Muckleston* by fealty and the use of doing suit at the Court of the said manor holden to be holden from three weeks to three weeks within said manor, of which manor with the appurtenances defendant *Crew* on the 23d September 1740 and long was seised in his demesne as of fee; and then the defendants avowed the taking, &c. as a distress for the said suit said Court so undone and unperformed.

1746.

CHET-
WODE, Et
against
CREW.

The plaintiff, in his first plea in bar to the first avowry, protesting that he did not hold the said tenements, &c. of defendant *Crew*, as of his manor of *Muckleston* by fealty and the yearly rent, &c. and also by the service of suit at the supposed Court of the said supposed manor, pleaded that the defendants of their own wrong took the saddle, traversed the holding of the defendant's (*Crew's*) suit for the supposed manor, &c. in manner and form as was the defendants in the avowry and cognizance alleged. 2dly, Pleaded that the said tenements with the appurtenances of, &c. were out of the fee and lordship of the defendant *Crew*. 3dly, After protesting that the defendant *Crew* never seised of the said services, &c. as alleged, he pleaded that he held the said tenements, &c. of the defendant *Crew* as of his said manor by the rent of 1s. only payable every year at the feast of *Pentecost*, traversing that he held them of the defendant *Crew* by fealty and the yearly rent of 3s. payable at the feasts of *Saint John the Baptist* and *Saint Martin the Bishop*, and also by the service of doing suit at the said court, &c. 4thly, He pleaded that he held the said tenements, &c. of the defendant *Crew*, &c. by the yearly rent of 1s. payable at the feast of *Pentecost*, traversing that the defendant *Crew* was seised of the said service of suit by the hands of the plaintiff as by the hands of his tenant, in manner and form, &c.

In the second third and fourth avowries the plaintiff pleaded several pleas similar to those pleaded to the first avowry, mutatis mutandis.

In the fifth avowry he pleaded, 1st, that the defendants of their own wrong took the said saddle, traversing the holding

ing of the defendant's (*Crew's*) Court modo & form, &c. &c. That they took &c. of their own wrong, traversed the said messuage with the appurtenances whereof, &c. at the time when and also from time immemorial was miller of the said manor by fealty and the service of doing suit at the court, &c. as the defendants alleged, &c.

Issues were afterwards taken on each of these pleas.

On the trial of the cause at the assizes at *Stafford* in *March* next before Mr. *J. Douglas* a verdict was found on several issues as follows;

On the second and third issues on the first avowry, for the defendants generally.

Upon the sixth and fourth issues for the defendants, subject to the opinion of the Court on a case reserved.

On the third issue, on the second avowry, for the plaintiff.

On the second issue for the defendants generally.

On the first and fourth issues for the defendants, subject to the case as above.

On the second issue on the third avowry, for the defendants generally.

On the third for the plaintiff.

On the first and fourth issues for the defendants, subject as above.

On the second issue on the fourth avowry, for the defendants generally.

On the third for the plaintiff.

On the first and fourth for the defendants, subject as above.

On both the issues on the last avowry for the defendants, subject as above. And if the Court should be of opinion that judgment should be entered for the plaintiff, then the law found for damages for him and 40s. costs: but if they should be of opinion that judgment ought to be entered on any of the 2 issues for the defendants, then they found the law damages and costs for them.

As to those issues, on which the case was reserved, the case appeared to be thus; that the defendant *J. Crew* had for

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any years past been and still was lord of the manor of *Weston*, of whom the plaintiff held the messuage and stallage therein &c. as of his said manor by fealty and the yearly rent of 3s. payable at the feasts of the nativity of *Saint the Baptist* and *Saint Martin the Bishop* by equal portions and also by the service of doing suit at the court of the manor from three week to three weeks; and that before the plaintiff had any estate in the tenements in which &c. one *Chetwode*, his ancestor and whose heir the plaintiff is, he said rent and did suit to the said court in person. When the plaintiff became seised of the said premises in the year 1733 on the death of his late father *John Chetwode*, and ever since duly and regularly paid the said yearly rent of the defendant *Crew*. That *S. Davison* was at the time holding the several courts hereafter mentioned and had for many years before another ancient freehold tenant of the said manor and owing suit to the lord's said court there, the defendant *Crew*, being in 1736 seised of the said manor, conveyed part of the demesnes thereof to *John Crew* the younger and his heirs to hold to him as of his said manor by fealty and suit of court, and at the same time conveyed part of such demesnes to *C. Crew* and his heirs upon the same tenure. That at a court holden in and for the said manor on the 31 of *October* 1737 before *T. Read* steward of the said manor the said *John Crew* the younger and *Crew* appeared in person and did their suit and service as freehold tenants of the said manor. That afterwards on the day mentioned in the several avowries, to wit, on the 31 of *September* 1740 *T. Read*, the then steward, held the court in and for the said manor, at which proclamation was duly made before the steward of the said court, and the said *John Crew* the younger and *C. Crew* appeared there in person as freehold tenants of the said manor, and did their suit and service there; and they the said *John Crew* the younger and *C. Crew* together with divers other inhabitants not freeholders within the said manor were sworn upon the homage; but neither the plaintiff nor the said *S. Davison* appeared at that court, but made default.

The jury having found that the messuage and premises in the pleadings mentioned were within the fee and lordship of

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of the defendant *Crew*, and that the plaintiff and *S. Davison* were the only remaining ancient freehold tenants of the manor, it was agreed that the defendant *Crew* had a right to hold a court-baron there. But the

First question reserved for the consideration of the Court was whether, as no freeholders but *John Crew* the younger and *C. Crew* the newly-created freeholders appeared or were sworn upon the homage at the court held on the 23d of September 1746, though notice was duly published and the plaintiff personally summoned, that court were or were not legally holden.

Secondly; It not appearing that the plaintiff had ever actually performed his suit of court, the next question arose on the issues joined upon the defendant *Crew's* seisin of this service by the hands of the plaintiff as of his very tenant; whether seisin of the rent by his hands did not amount to a seisin of the suit of court, and if not, whether the want of such seisin could prevent the defendants' having judgment on such of the avowries wherein seisin thereof was alleged.

Thirdly; If the Court should be of opinion that the defendant *Crew* were not seised of such service by the hands of the plaintiff, and for want thereof could not have judgment on any of those avowries wherein such seisin was alleged, whether the tenure be fealty rent and suit of court as above stated were not sufficient evidence of the tenure alleged in the last avowry so as to entitle the defendants to judgment thereon, though proved to be larger and more extensive than that alleged in the last avowry.

This case was twice argued; the first time by *Booth* Serjt. for the plaintiff and *Draper* Serjt. for the defendants on the 5th of February 1745, and again on this day by *Wynne* Serjt. for the former and *Willis King's* Serjt. for the latter, when

The Court gave

Judgment (a) for the plaintiff.

(a) The reasons given by the Court do not appear among the papers of the Chief Justice: but the following account is taken from Mr. J. *Bay's* notes book.

“ Upon

in several avowries the questions were

Whether a tenure can be created at this day?

Whether a court-baron can be holden by the steward?

Whether two suitors or freeholders at least are not the necessary
the court?

After two arguments *Willes C. J.*, *Abney* and *Burnett* Justices, were
on that no tenure can be created at this day (1). That the steward
about two (2) freeholders at least, cannot hold a court-baron. And
suitors (3) are the judges and not the steward."

1746, 7-

at 18 *Edw. 4* c. 1. and *Bradshaw v. Lawson*, 4 D. & E. 443.
"id. Co. Lit. 58. a; *Bro. Abs.* title "Comprise," pl. 31; and *ib.* title
"," pl. 5; 2 *Rel. Abr.* pl. 2; *Telv.* 190, 191; *R. v. Staverston*;
Lane, 3 D. & E. 122. 447. and *Bradshaw v. Lawson*, 4 D. & E.
an amercement at a court-baron on a free suitor of the manor must
be held by two freehold tenants of the manor. *Baldwyn v. Tudge*, 2
; and S. C. MS. *Willes* Ch. J. which agrees with the report in *Willes*,
an additional fact that it was stated negatively in the special case that
affeerors, though they resided within the manor, "were not free-
holders or free suitors of the said manor."

Id. 4 *Inst.* 2.

GREENHOW against ILSLEY and Four Others.

Hil. 20 G. 2.
Wednesday,
Feb. 4th.

It was an action on the case. The first count in the
declaration before stated that before and on the 1st of
1743 and ever since the plaintiff was possessed of an
messuage and divers, *ss.* 200 acres of land with the
tenancies at *Sandhurst*, in the county of *Berks*, and by
thereof had and of right ought to have right of com-
mon of pasture for all his commonable cattle levant and
ant in and upon the said messuage with the appurte-
ances in *Sandhurst Common* at all times of the year, except
and from the 10th of *June* until and upon the 10th of
yet that the defendants on 20 acres of the soil of the said
common wrongfully cut and dug turves, to wit 100 cart-
loads of turves, and carried them away, whereby the plaintiff
cannot enjoy his common of pasture in so large and bene-
ficial a manner as he ought &c. In the second count the
plaintiff claimed a right of turbary on the same common in
the right of an ancient messuage &c.

The defendants pleaded the general issue.

It is an action by a commoner against the lord for injuring his right of common,
it set forth his title: but in an action against a stranger and wrong-doer, he need
not state his possession.

And

1746, 7. And four of them, as to the first count, pleaded that *A. Williamson* was seised in fee of the manor of *Sandhurst*; and that the defendants as his servants and by his command cut and dug the said 100 cart-loads of turves &c., as being in his several soil and freehold, and carried them away for his use, as it was lawful for them to do. To the second count they pleaded a similar plea.

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HOW
against
LISLEY &c.

The plaintiff new assigned, as to the first count, that the turves therein mentioned were cut and dug for sale, and carried away and sold, and were other 100 cart-loads of turves than those in the first special plea mentioned to be dug taken and carried away for the use of *A. Williamson*; and the like as to the second count.

To the whole of the new assignment the defendants rejoined that *A. Williamson* long before the said time when &c., *sc.* on the 27th of *October* 1735, and before was and still is seised in fee of the manor, and that he then gave and granted to one *T. Solmes* in his lifetime license and liberty to cut and dig turf and peate for sale from off the said place called *Sandhurst Common*, and to take and carry away the same and to sell and dispose thereof for his own use at his own will and pleasure, to have and to hold the said license and liberty unto the said *T. Solmes* from the feast of *Saint Michael* then last past for 99 years if *T. Solmes* should so long live; by virtue of which license and liberty these four defendants during the lifetime of *T. Solmes*, *sc.* on the 1st of *May* 1743, and on divers other days &c., as servants of *T. Solmes* and by his command cut and dug the said turves &c. for the purpose aforesaid, and took and carried them away and delivered them to and for the use of *T. Solmes*, as it was lawful for them to do &c.

To this rejoinder there was a general demurrer, and joinder in demurrer.

Belfield Serjt. for the plaintiff insisted that the lord of the manor could not justify cutting turves, so as to prejudice the rights of the commoners, and consequently could not give a
license

license to others to do that which he could not do himself. 1746, 7.
 And that the plaintiff was not obliged to reply that there
 was not sufficient common left, because it was the gift of his
 action, and was already set forth in the declaration. *Smith*
v. Feverell, 2 *Mod.* 6.

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 against
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Draper Serjt. for the defendants. Though the commoners
 can only take turves for fuel, the lord may take them for
 sale. Besides the plaintiff should have shewn his title *Wag-*
staff v. Rider, *Com. Rep.* 341., the action being brought
 against those who justify under a terre-tenant. It clearly
 would have been necessary, if the defendant were owner of
 the soil, *Hunt v. Gouch*, *T. 2. Geo. 2. B. C. Rsl.* 596, and
 this is the same thing (a); whereas the plaintiff relies mere-
 ly on his possession.

Willes Lord Chief Justice was of opinion that the defendants
 should have averred that there was sufficient common left for
 the plaintiff; and that the plaintiff was not obliged to reply
 it, as it was already alleged in the declaration. As to the
 objection that the plaintiff ought to have set forth his title,
 which it was insisted he ought to have done against a terre-
 tenant, his Lordship gave no opinion upon that point, be-
 cause the defendants only claimed under a license, which
 having exceeded they must be considered as wrong-doers and
 strangers,

The three other Judges were of the same opinion; *Bur-*
nett J. adding that, admitting Serjt. *Draper's* rule that the
 title must be set forth in an action against the owner of the
 soil, the defendants in this case must be considered as wrong-
 doers (b).

Judgment for the plaintiff (c).

(a) But see 1 *Barnard.* 432.

(b) That, as against a wrong-doer, it is sufficient to declare on possession;
 see *Birt v. Storde*, 12 *Mod.* 97; *Comb.* 370; and *Stin.* 621.

(c) The cause was afterwards tried upon the general issue, and after a long
 hearing the plaintiff was nonsuited. This gave rise to the question in *Barnes*
 136. respecting the costs. In *Barnes* 138. it is said that there was a difference
 of opinion among the Judges respecting that determination: in Mr. J. *Abney's*
MS. it appears that the whole Court of King's Bench and one of the Barons
 were against that decision. Vide *Duberley v. Page*, 2. *D. & E.* 391.

whomarries in order to have a consultation, pleaded the
 by license on which he had insisted below;” “ That
 in another parish shall of *Saint Martin* in *Birmingham* in the cou
 pay 5s. to the there is and from time whereof &c. there
 rector of A. tain ancient custom used and approved of, t
 for and in man being a parishioner inhabitant or resid
 regard of the the said parish of *Saint Martin* that hath m
 said marri- wife or marrieth or taketh to wife a wom
 age as it it or inhabiting within the said parish or within
 had been so- and procureth and hath the said marriage sol
 lemnized in him and her the said woman by virtue of
 A., is bad. other church chapel or place and not in t
Saint Martin, hath for all the time aforesai
 and ought to pay to the rector of the rector
 rish church of *Saint Martin* for the time
 five shillings of lawful money of *Great B*
 regard of the said marriage, as if the sa
 tually had and solemnized in the said parish
Martin.”

To this plea there was a general demur
 in demurrer.

Boote Serjt. for the plaintiff. The custo
 reasonable and void. 2 *Lutw.* 1059. *Thom*
 No fees are due for christening or burying t
 and even then the duty must be performe
Dr. Lancaster, Salk. 322. And in the c
ram v. Scott. 2 *Ld. Raym.* 1558. it was hol

publishing banns; and licenses were introduced by the 103^d 1746, 7. canon as a dispensation with banns. Some fee was always due for marriage. The office of matrimony directs that the usual fee shall be laid down on the book.

RICHARDS
against
DOVEY.

Willes Lord Ch. J. was of opinion that the custom as pleaded was void; but should have doubted if it had been pleaded to be due as coming in lieu of the fee due on publishing banns which are dispensed with by license.

Abney J. Matrimony is a sacrament, 1 *Gibb.* 431 (a), and therefore no fee ought to be paid for it. *Lindwood* 678. And he referred to *Anderfon v. Walker*, *Lutw.* 1030; *Topsall v. Ferrers*, *Hob.* 175; and *Bourdeaux v. Dr. Lancaster*, case in *W.* 3^d's time (b) 171. *Salk.* 332; and the Dean and Chapter of *Exeter's* case, *Salk.* 434.

Burnett J. and *Birch J.* of the same opinion.

Per Curiam

Judgment for the plaintiff.

(a) The words of the canon are, "Firmiter inhibemus ne cuiquam pro aliqua pecunia denegetur sepultura, vel baptismus, vel aliquod sacramentum ecclesiasticum, vel etiam matrimonium contrahendum impediatur."

(b) 12 *Mod.* 171.

JAMES AUSTIN against K. WHITTRED.

T. 21 G. 3.
Monday,
June 29th.

"TRESPASS. The plaintiff declares that the defendant on the 3^d of September 1745 at Cambridge took and carried away nine cheeses, one pair of scales, one scale beam, and one triangle belonging to the said beam, of the plaintiff's, value 10^l., and converted and disposed thereof to his own use. Damage 40^l."

Every person has of common right a liberty of carrying his goods to a public fair for sale; and consequently goods cannot be distrained, damage feasant, by the owner of the soil and out fair.

The defendant pleads two justifications, after having pleaded not guilty to all the trespasss except taking and carrying away the cheeses &c.; first that the town of Cambridge with the liberties thereof at the said time when &c, was and time

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against
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out of mind hath been an ancient town and borough; and that there is and at the said time when &c. was and time out of mind hath been a certain ancient fair of right holden and kept at *Barnwell* and *Sturbridge* in the said county within the liberties of the said town and borough yearly, and every year on the feast of *Saint Bartholomew* the Apostle and from thence continually until the 14th day next after the feast of the *Exaltation of the Holy Cross* for the buying and selling of any kind of goods and merchandizes in the same fair, together with all and all manner of jurisdictions authorities courts profits of courts free customs tolls dockages pickages stallages booths groundages advantages commodities profits cements, and other liberties whatsoever to the same fair belonging, of which said fair and other the premises thereunto belonging as aforesaid (except certain liberties jurisdictions &c. to the chancellor master and scholars of the university of *Cambridge* in the same town of *Cambridge* belonging, and by them of old time had used and enjoyed) and also of the sole and separate use of the ground and soil of the places at *Barnwell* and *Sturbridge* where the said fair is and hath been and ought to be held as aforesaid for and during all the respective times of holding the said fair for pickage stallage and groundage there and all other uses and purposes of the said fair the mayor bailiffs and burgesses of the said town of *Cambridge* at the said time when &c. and long before were and still are seised in their demesne as of fee. And the said defendant further saith that the said mayor bailiffs and burgesses being so seised of the said fair with the appurtenances and of the said soil as before mentioned on the feast of *Saint Bartholomew* the Apostle in the year 1745 and from thence continually until the 14th day after the *Exaltation of the Holy Cross* in the same year the said fair of the said mayor bailiffs and burgesses was holden and kept at *Barnwell* and *Sturbridge* aforesaid within the liberties of the said town and borough for the buying and selling of any kind of goods and merchandizes in the same fair; and because the said cheques &c. at the said time when &c. being in and during the time of the said fair were wrongfully put and placed in and upon the ground and soil of the said mayor bailiffs and burgesses called *Sturbridge Fair*, to wit, where the said fair was so held as last aforesaid and within the liberties aforesaid incommen-

being

ring the said ground and soil, and doing damage to the said mayor bailiffs and burgeses in the use of their said soil &c. the said *K. Whittred* as servant of the said mayor bailiffs and burgeses and by their command at the said time when, &c. in and during the time of holding the said fair *he and seised the said cheeses, &c. so doing damage there for &c. in the name of a distreys for the said damages so done* and doing to them, and carried away the same, as it was lawful for them to do, and so justifies the doing it.

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To this the plaintiff replied; and in his replication insisted that he was a cheesemonger, and that at the time when, &c. he brought the cheese into the said fair and put and placed the same in and upon the said ground and soil of the said mayor, called *Sturbridge Fair* in the said fair there so held as aforesaid to expose to sale and to sell the same there in the said fair, and did then and there expose to sale the said cheese upon the said ground and soil in the said fair there, and that he had the said scales, beam, and triangle, being the necessary utensils and implements of the said trade and business of the said plaintiff for the weighing of the said cheese so exposed to sale there when sold to the buyers thereof were also then and there brought along with the said cheese for that purpose by the plaintiff and put and placed along with the said cheese in and upon the said ground and soil of the said fair there for that purpose, as it was lawful for him to do; and that the defendant of his own wrong took seised and carried away the said cheese so exposed to sale in the said ground and soil in the said fair there, and the said pair of scales, &c. when and there in the said fair found; and this he is ready to satisfy, wherefore he prays judgment, &c.

The defendant, by his rejoinder, confesses the fact to be as set forth in the plaintiff's replication, but insists that the plaintiff put and placed the said cheese upon the said ground and soil in the said fair there for the purpose in the said replication mentioned without the license consent or agreement of the said mayor, &c. for this purpose had and obtained, and against the will of the said mayor, &c. therewith encumbering the said ground and soil in the said fair there, and doing damage to the said mayor, &c. in the use and enjoyment of the said soil there, as the said defendant hath

S f

before

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before alleged; and this he is ready to verify, wherefore he prays judgment, &c.

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To this rejoinder the plaintiff demurs generally, and the defendant joins in demurrer.

The second plea is something different from the first; and an issue being joined upon an immaterial part of it, viz., whether the place where the said cheese, &c. was put was part of the ground within the said fair commonly called the Cheese Fair, which issue was sent down to trial, and a verdict was found for the plaintiff, who affirmed that it was on part of the ground called the Cheese Fair, this second plea is quite out of the case.

But it comes on now before the Court upon the plaintiff's demurrer to the defendant's rejoinder on the first plea.

And several objections (a) were taken to this plea of the defendant;

1st, To the form of the plea;

2dly, To the substance.

First, to the form, 1st, That the defendant had not set forth a right to the soil in the persons under whom he justifies, but only a right to an easement or privilege in the soil, and therefore could not distrain for damage done to the soil, because they could not have an action of trespass (b) but only an action on the case.

2dly That the defendant has not shown when their right commenced, nor under what title they claim it.

(a) This case was twice argued; the first time in the *Easter* term preceding by *Becke* Serjt. for the plaintiff and *Droper* Serjt. for the defendant, and again on this day by *Wynne* Serjt. for the former and *Prime King's* Serjt. for the latter.

(b) But as those under whom the defendant justified were entitled to the sole and separate use of the ground and soil of the place where the fair was holden during the fair, *quære* if they might not have maintained *trespass* against any person who committed a trespass on the ground. Vid. 2 *Ru. Abr.* 549. H. pl. 1.; *Dyer* 285, b. pl. 40.; *Wilson v. Mackreth*, 3 *Barr.* 1824.; and *Eurt v. Moore*, 5 *D. & E.* 329.

y, That if this were not generally necessary where is plead that they are seised in fee, yet that it is necessary in this particular case, because the right which they claim is laid to be a prescriptive right, and therefore as they do not say that they had it by prescription, or time out of mind, but only say that at the time when, &c. and long before and still are seised of this right, they ought to show when and by what grant or title such right was derived in them.

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The objection to the plea in point of substance was, that the defendant having admitted that the place where, &c. was the place where the fair was held, every one has a right to come there to sell his goods, and consequently to lay them upon the ground in order to expose them to sale as a necessary incident to such right; and as it admitted by the plaintiff that the cheeses were put there to be exposed to sale, that the pair of scales and other things were necessary for weighing and selling the cheese and put there for that use, the defendant had a right to place them there, and consequently could not be distrained as damage fea-

As to the objections to the form of the plea, *The Court* gave no positive opinion, but thought that the defendant might have set forth his case better; that he ought to have shown the title of the mayor, &c. more particularly as he claimed a prescriptive right; and that they might have shown more fully that they were owners of the ground and soil. But we thought that these defects were aided by the plaintiff in his replication saying and adding that he put and placed his cheese, &c. in and upon the ground and soil of the mayor, &c. or by his replying to the defendant's plea without insisting on these defects as special demurrer, but gave no positive opinion whether they would have been fatal defects if he had so done. However, it was insisted on by the defendant (which was of great weight) that a person may distrain things damage fea- even though he be not owner of the soil, but has an easement or profit out of it; and the instance of the commoner was mentioned which was certainly true.

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against
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TARD.

But not being quite agreed in our opinions in respect to the objections to the form of the plea, we gave no positive opinion about them, being all clearly of opinion that the plea was bad in substance (a)."

(a) This account, which appears to have been written by the Chief Justice in one of his note-books after the case was determined, finishes abruptly, the reasons which induced the Court to decide that the plea was bad in substance not being added. But it clearly appears from a short note on the back of his Lordship's paper-book, written in court, that the grounds of decision were those mentioned by Mr. J. Abney in giving his opinion. "Abney J. The defendant in this record passes over all customary payments, and puts his case merely on a right to distrain goods, as damage feasant, that were legally placed in the fair. Now I admit that every thing that is damage feasant is distrainable: but the cheese was not damage feasant, and therefore the distress was unlawful. By the common law no toll is due for things brought to the fair unless sold, and then the buyer is to pay it: but by a special custom, it is true, that man shall pay for his place, namely, his standing, though he sell nothing. *Bro. Abr.* "toll," pl. 2; *Sir T. Jon.* 227. A pitching 1d. for every hundred of cheese exposed to sale in a market. But admitting that in this case the plaintiff could not pitch or ground his goods without a reasonable satisfaction, it would yet be against the defendant; for this is not a distress for groundage; and if it had, if the sum had been certain, it ought to have appeared that the Court might judge whether or not it were a reasonable sum. That goods (1) brought to a fair to be sold are exempted from distress, the cases of *Launceston*, *Cro. Elm.* 75. *Leadenhall Market*, *ib.* 628, and 2 *Ld. Raym.* 1529. clearly prove. And I do not know any judicial authority or even obiter opinion against them. It is absurd to say that the goods were legally placed there, and eo instanti were doing damage. 8 *Co.* 146. (2). *The Sea Carpenters' case*. An hostler cannot distrain my horse damage feasant; for I have a right of entry."—MS. *Abney J.*

(1) But though every person has of common right a liberty of bringing his goods to a fair or market for sale, he has no right to erect stalls, or to bring tables, there for the purpose of exposing his goods thereon to sale: and if he erect the one, or bring the other, without the consent of the owner of the soil, he subjects himself to an action of trespass. *The Mayor, &c. of Northampton v. Ward*, 2 *Sr.* 1238, and 1 *Wils.* 107; and *The Mayor, &c. of Norwich v. Swan*, 2 *Bl. Rep.* 1116—See the case of *The Clerk of the Tithes of Taunton Market v. Kimberley*, 2 *Bl. Rep.* 1120.

(2) Second resolution there.

FULLER qui tam against SAY Clerk.

1747.

M. 21 G. 2.
Monday,
Nov. 16th.

a prohibition tried at the *Lent* assizes at *Thetford*, in *Sorfolk*, before Mr. J. *Abney*, a special case was reserved to the opinion of the Court of Common Pleas.

A custom that every inhabitant of a parish of the age of 16 (of whatever religious sect) shall pay 4d. yearly as an Easter offering, is good.

It stated that within the parish of *Swaffham* there is from time whereof the memory of man is not to the contrary there hath been a certain ancient and laudable custom and approved within the same, that is to say, that every married man inhabiting and residing within the said parish of *Swaffham* with his wife, such married man and his wife respectively being of the age of 16 years or older, hath and been used and accustomed to pay and yet of right it to pay for himself and his wife to the vicar of the parish church of *Swaffham* for the time yearly at the feast of *Easter* or so soon after as the same has been demanded four-pence as for and in the name of their offerings. That at *Easter* 1745 and long before then the said man and his wife inhabited and resided within the parish of *Swaffham*, and were respectively of the age of 16. That the said man and his wife were *Quakers*; and that neither of them ever went to the church of *Swaffham*, or ever received the sacrament or communion with or from the defendant, the vicar of *Swaffham*; and that neither the plaintiff nor his wife ever participated of or personally attended at any of the offices of the church. And the question was whether the defendant was entitled to a writ of *confession*.

This case was argued by *Leeds* Serjt. for the plaintiff, *Bellfield* Serjt. for the defendant.

For the plaintiff it was contended that this *Easter* offering in the nature of a fee for administering the sacrament, that as the duty was not performed the fee was not

2 *Lutw.* 1010. *Lindw. lib.* 1. tit. 2.; and *lib.* 3. tit. *Selden's Tithes*, c. 4. *Spelm. de non tenendis Ecclesiasticis*, c. 4. *Spelm. c.* 4.; *Godolph. Repert. Canon.* 441.; *Fox's and Monuments*, vol. 3. p. 10.; the rubrick at the end of the communion service; *Stillingfleet's Ecclesiast. Cases*, 1 vol.

1747. vol. 292; *Gibb*. 340; *Archbishop Sedbury*, 469; stat. 37 Hen. 8. c. 12. f. 12. *Wats. Clerg. Law*, c. 52. That this custom was too general, because it claimed the fee from those who do not, as well as from those who do, receive the sacrament. And that it was void, because it does not except those persons who are excepted by stat. 1 W. & M. c. 18. f. 1.; and Quakers are there exempted, they being at liberty to attend their own places of religious worship. And the case of *Richards* q. t. v. *Dovey* (a) Clerk was cited to shew that this custom was unreasonable.

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qui tam
against
SAY.

For the defendant, it was argued that the defendant was entitled to these fees under the custom from a consideration, 1st, negatively of what *Easter* offerings were not, and 2dly, affirmatively of what they were. 1st, That they were not sacramentary, nor paid on account of the administration of the sacrament; *Dr. Ayliffe's Pur. Juris Canonici*, fo. 195. 2dly, That they were formerly voluntary offerings, but were now due by custom in some parishes, and are only called *Easter* offerings because payable at *Easter*; *Dr. Ayliffe's Pur.* 60; 392, 3; stat. 27 H. 8. c. 20; 32 H. 8. c. 7. f. 2; 2 & 3 Ed. 6. c. 13. f. 7. 10. (b); 1 W. & M. c. 18. f. 6. (c); 2 *Inst.* 659. That the custom was established by the verdict; and that the voluntary absence of the parishioners could not excuse them from paying the duty. And that the toleration act saved the right to the parsons, &c.

Upon this argument each of the judges expressed a strong opinion in favor of the defendant.

Willes Lord Ch. J. said that the custom was found by the verdict; that it did not appear to him to be either illegal or unreasonable; that by the rubrick, "every parishioner is to communicate at least three times in the year, of which *Easter* shall be one; and yearly at *Easter* every parishioner

(a) *H. 20 G. 2. supra*, 621.

(b) Which enacts that all and every person and persons who by the laws or customs of the realm ought to pay their offerings shall yearly pay them to the parson, &c. at such four offering days as at any time theretofore within the space of four years last past had been used and accustomed for the payment of the same, and in default thereof to pay for their said offerings at *Easter*.

(c) By the sixth clause of the toleration act it is enacted that nothing therein contained shall exempt any persons from paying tithes or other parochial duties, or any other duties to the church or minister.

is to reckon with the parson vicar or curate *and pay* to him or them all *ecclesiastical duties accustomedly due* there and at that time to be paid;" and that the defendant's right was expressly saved by the stat. 1 IV. & M. c. 11. f. 6.

1747.

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But "this being a matter that concerned so great a body of men as the Quakers, though the Court had very little doubt, at the earnest desire of the plaintiff they ordered it to be spoken to again next term. Afterwards however, in the next week, several of the Quakers came into court, and said that upon consideration and consulting with their counsel they did not desire to hear it spoken to again, but were willing that the Court should give judgment this term."

Accordingly on the last day of this term the Lord Chief Justice delivered the opinion of the Court (*a*) in favour of the defendant, and a writ of consultation was awarded.

(*a*) The reasons of the Court as delivered by the Chief Justice do not appear: but the separate opinions of the three other Judges given on the first argument were thus given according to Mr. J. *Abney's* MS.

"*Abney J.* It seems to me very difficult to give an exact historical account what *Easter* offerings were or for what they were due. However to avoid the great uncertainty the stat. 2 & 3 Ed. 6. was made, by which a clear rule is laid down for the guide of the parson vicar and parishioners. *Gibson*, (p. 738.) says they were a kind of composition for the oblation due on certain solemn occasions; and (fo. 740.) partly a composition for the holy loaf, which the communicants used to bring and offer, and which, as Dr. *Gibson* says, is to be answered at *Easter*, because by the rubrick every parishioner at that great festival was bound to communicate. It is plain that he knows not what to make of them. What has the holy loaf to do with the wafer? They rather seem to me to be in the nature of a personal tithe, which by stat. 2 & 3 Ed. 6. c. 13. f. 10. was to be paid at *Easter*. The stat. 13 Ed. 1. ft. 4. c. 1. de circumspicte agatis treats of them as mere spiritual things, and gives the cognizance of them to the spiritual court only. It seems originally to have been a voluntary or free gift either at marriage, purification, now vulgarly called churching of women, or at burials; and so is *Livewood*, lib. 3. de Decimis et Oblationibus, fo. 185; and when in money, a penny, halfpenny, or farthing, or any other thing. But the Popish clergy were so angry at any attempt to fix a certain sum that in 3 Ed. 3. a constitution was made that whosoever attempts to fix the sum shall be excommunicated with the greater excommunication; it being the constant aim of the *Romish* clergy to get all they could of the deluded laity. But this occasioned such a variation in the oblations that it produced the stat. 2 & 3 Ed. 6. c. 13. f. 10., a reasonable and wise provision; which enacts that all persons who by the laws or customs of the realm ought to pay offerings shall yearly pay the same at the four usual offering days or at the feast of *Easter* (1). This statute made parochial custom the rule and guide, and put an end to the canons and constitution.

By

(1) See also *Doe v. Leifield v. Tydale*, Hob. 10, 11.; and *Cartwright v. Edwards*, Amb. 72.

1747.

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against
BAY.

By the rubrick 5 & 6 *Ed.* 6. Every man and woman is to pay to the curate the due and accustomed offerings

Rubrick 13 & 14 *Car.* 2. Yearly at *Easter* every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to him or them all ecclesiastical duties accustomedly due. The stat. 7 & 8 *W.* 3. c. 6. gives two justices of the peace jurisdiction over oblations and offerings; and the statute 3 & 4 *An.* c. 18. makes it a perpetual law. By the rubrick at the communion, if there be no oblation or alms then the priest shall say, &c.

But it is said that the plaintiff is a Quaker, and as such is exempted: but how does the exception appear? For

1st, The custom found is general, *every* married man.

2dly, The canon is general, *all* persons.

3dly, The stat. *Ed.* 3. is general, *all* persons.

4thly, The rubrick *Ed.* 6. is *every* man and woman.

5thly, The rubrick 13 & 14 *Car.* 2. is *every* parishioner.

The statute 1 *W.* & *M.* c. 18. § 6, that most excellent and Christian law, has these words, "nothing in this act shall exempt any persons from payment of tithes or other parochial duties or any other duties to the church or minister."

From all which I conclude that a consultation ought to go. And I confess I saved this case at the assizes not from any difficulty I was then in, but because it concerned great numbers of parochial clergy and so considerable and loyal a body of the subjects as the Quakers are.

Burnett J. The toleration act, which was an act of great indulgence to Protestant Dissenters, would be a mean of destroying the established church, if the not participating of the sacrament would be an exemption from the payment of tithes or other duties. But the service of the church is for the advantage and benefit of all the parishioners. The toleration act has excused Quakers from attendance but not from payment.

Birch J. The demand is founded on the stat. 2 & 3 *Ed.* 6.; and I see no color of exemption in any law by being a Quaker."—*MS.* *Abney J.*

M. 21 G. 2.
Saturday,
Nov. 21st.

HILDENBY v. TUKE.

To a plea of tender plaintiff replied a demand and refusal before suing out the writ; rejoinder that before suing out the writ he tendered &c. traversed

ASSUMPSIT for work and labor, &c. There were four counts in the declaration; and in each the sum of 3*l.* 18*s.* 10*d.* was claimed.

Plea, non assumpsit as to three last counts; and as to the 3*l.* 18*s.* 10*d.* in the first (a) a tender in the common form.

Replication, that after the making of the said first promise and

ing that at any time after the tender and before suing out the writ plaintiff requested him to pay, &c.—Rejoinder held bad on demurrer. In a plea of tender defendant must say he was always ready to pay: ready from the time of the tender is not sufficient.

(a) The practice formerly was to plead the tender to one count only; but he may plead a tender to the whole, if he please; though he cannot plead non assumpsit

and undertaking &c. and before the suing out of the said original writ of the plaintiff to wit on the 29th of April 1747 the plaintiff requested the defendant to pay him the said 3*l.* 18*s.* 10*d.*, and the defendant then and there wholly refused to pay &c; and this he is ready to verify.

1747.

HALDEN-
BY
against
TUCK.

Rejoinder, that before the suing out of the original writ the defendant tendered and offered to pay to the plaintiff the sum of 3*l.* 18*s.* 10*d.*, as by the said plea he hath above alleged, without this that the plaintiff at any time after the tender and before the suing out of the original writ of the plaintiff requested him to pay &c.

To this the plaintiff demurred, and shewed for cause that by the rejoinder the defendant traversed matter not alleged in the replication, and that the rejoinder was no answer to the replication, but totally immaterial &c.

Pooler Serjt., for the plaintiff, argued that it was not necessary to allege that the demand and refusal were after the tender. That if there were a refusal before, the plaintiff had received damages. And he cited *Giles v. Hart*, *Salk.* 622; and 1 *Ld. Raym.* 254, and *Sweatland v. Squire*, *Salk.* 623 (a) to shew that "always ready from the time of tender is not a good plea to assumpsit."

Agar Serjt. for the defendant. The plaintiff ought to have said that the demand was after the tender. Here was a tender of the whole that was due to him. And he cited a case in this court, *Burdus v. Keilborn*, *Tr.* 19 & 20 *G.* 2. The replication has not admitted or denied the plea. After the tender the plaintiff ought to have demanded damages.

Pooler Serjt. in reply. The plaintiff in his replication denied the material part of the plea, namely, that the de-

assumpsit as to the whole, and a tender as to part, *Macellan v. Howard*, 4 *D. & E.* 194. And therefore the usual mode now is to plead non assumpsit as to the whole, except such a sum, and a tender of that sum.
(a) *Whitlock v. Squire*, 30 *Mod.* 81. *S. P.*

1747. fendant was always ready to pay. The traverse in the re-
joinder is of matter which is not alleged in the replication:
besides the plaintiff is entitled to damages for the demand
and refusal.

HALDEN-
BY
against
TOKER.

Willes Lord Ch. J. was of opinion that the rejoinder was bad, and the replication good.

Abney J. Semper paratus (a) is of the essence of a plea of tender.

Burnett J. Damages may be recovered for non-payment on the first demand.

Birch J. Agreed on both points.

Judgment for the plaintiff (b).

(a) The defendant must also say that he tendered and offered to pay.
French v. Waisan, 2 Will. 74.

(b) Vid. *Douglas v. Patrick*, 3 D. & E. 683.

M. 21 G. 2.
Tuesday,
Nov. 24th.

JEFFERY qui tam against COLES.

An action to recover a penalty under the stat. 5 & 6 Ed. 6. c. 14. must be brought in the county where the fact was committed, and not commenced in the superior courts at Westminster.

TO an action of debt, brought on the stat. 5 & 6 Ed. 6. c. 14. against regrators forestallers and ingrossers (a), the defendant pleaded nil debet; and on the trial at the assizes in *Somersetshire* a verdict was found for the plaintiff, subject to the opinion of the Court of Common Pleas on the following case.

The defendant on the 11th of *March* 1745 at *Bridgewater* in the county of *Somersetshire* bought six weather sheep alive of the price of 3*l.* 18*s.*, and on the 25th of *March* 1746 sold the same sheep alive at *Axbridge* in the said county, contrary to the statute. And the question reserved was whether the action was well brought in the Court of Common Pleas at *Westminster*, charging the offence to have been done and committed (as in truth it was) within the county of *Somerset*, or whether the defendant ought to have been

(a) This statute has been since repealed by stat. 12 Geo. 3. c. 71.

charged

charged therewith in any other manner or by any other suit or prosecution commenced and laid within the said county of *Somerset* only and not elsewhere, pursuant to the stat. 21 Jac. 1. c. 4. 1747.

JEFFERY
qui tam
against
COLES.

After two arguments at the bar on the 2d of *July* and the 24th of *November* 1747 by *Bellfield* Serjt. for the plaintiff and *Draper* Serjt. for the defendant,

The Court gave their opinion in favor of the defendant, and ordered a

Judgment (a) of nonsuit to be entered up.

(a) The reasons given by the Court do not appear among the Lord Chief Justice's papers: but the following is Mr. J. *Abney's* account of this case— And after consideration of a great number of cases cited, *The Court* were of opinion that the action was not maintainable in the superior court, unless the fact had been committed in *Middlesex*, being grounded on a statute precedent to 21 Jac. 1. c. 4. which has restrictive and negative words in it. And the true rule is that in all penal laws antecedent to stat. 21 Jac. 2. where the justices of assize and superior courts at *Westminster* had a concurrent jurisdiction (1) the suit must be commenced before justices of assize and sessions, and not before the justices at *Westminster*. For though the statute 21 Jac. gives no new jurisdiction to inferior justices, yet it in terms takes away the jurisdiction of the courts at *Westminster*. But in suits on those statutes that give debt &c. and mention not justices of assize or peace, they must be brought in the superior courts, otherwise there would be a defect of remedy. By this resolution the seeming contradictions in the cases are reconciled, many of which treat of this in a very loose manner." MS. *Abney*. J.

(1) But by these words must be understood "a concurrent jurisdiction both as to the subject matter and as to the mode of proceeding." And therefore where the stat. 1 Jac. 1. c. 22. inflicted certain penalties to be recovered (sect. 48.) by action of debt or information in the courts at *Westminster*, and (by section 50) gave jurisdiction to the justices of assize, of gaol delivery, and of the peace, "to inquire of the premises and to hear or determine the same," as under the latter clause the inferior courts could only proceed by indictment or presentment, it was holden that the informer might bring an action of debt in the court at *Westminster* for a penalty incurred in *Surry*, notwithstanding the stat. 21 Jac. 1. c. 4., otherwise the penalty could not be recovered at all. *Shipman* qui tam v. *Henbest*, 4 D. & E. 109. See also *Farrington*, v. *Koymer*, Cro. Car. 112; *Hutt*. 98; *Hick's* case, Salk. 372; and *Smith* v. *Pot*, 1 Str. 415.

1748,9.

MOYSE *against* COCKSEGE and Another.

Hil. 22 G. 2.

February 3d.

Parish offi-

cers levying

a poor rate

under a

warrant of

distress may

retain of the

goods sold

the necessary

expences of

the distress

and sale.

Barnes 459-

S. C.

TRESPASS for breaking and entering the plaintiff's house and taking the plaintiff's goods. Plea not guilty. On the trial at the assizes at *Bury* in *March* 1747 a verdict was taken for the plaintiff with 1s. damages, subject to the opinion of the Court on a case reserved.

The plaintiff the occupier of an house was rated 5s. 3d. in the poor rate, and on her refusal to pay, a warrant of distress was granted by two justices to the defendants, overseers, to levy of the plaintiff's goods; under which the defendants distrained the goods in question, kept them five days, then caused them to be duly appraised by a sworn appraiser, and sold them for 10s., that being the best price that could be got for them. The defendants paid the appraiser 1s. for his trouble in viewing and appraising the goods; and afterwards tendered to the plaintiff 3s. 9d. part of 10s. which she refused to accept; insisting that she ought to have 4s. 9d., 5s. 3d. only having been applied towards the poor rate.

The questions were, 1st, Whether the defendants ought to have tendered the plaintiff 4s. 9d. as the overplus; and 2dly, if they ought, whether *this action* were maintainable.

Prime King's Serjt. for the plaintiff argued, 1st, That the officers were not authorised by the stat. 43 *Eliz. c. 2.* to levy more than the sum assessed; no charges or expences being allowed by the act, as is the case in those acts of parliament where the Legislature intended to allow the charges of distress and sale; 13 *Eliz. c. 13. s. 5*; 2 *W. & M. c. 5. s. 2*; and 3 & 4 *W. & M. c. 12. 2lly*, That trespass was the proper action; for that where the law gives a license to do a particular thing and the party exceeds it, he is a trespasser ab initio, 8 *Co. 146*; 1 *Ventr. 36, 37. Cro. Eliz. 783*; 1 *Roll. Abr. 673*; and 6 *Mod. 216*.

Draper Serjt., for the defendants, insisted that the power of distress and sale given by the statute of *Elizabeth* also included

ded the expences necessarily attendant on that distress
 ale; otherwise the parish, for whose benefit the distress
 given, might be damnified instead of receiving a be-
 from it by expending more money in enforcing pay-
 than the sum unpaid amounted to. But 2dly, That
 1 events the action was misconceived, because the de-
 nts, if they were in the wrong had not been guilty of
 isfeazance, but of a non-feazance only in not paying
 money over to the plaintiff, for which trespass would
 lie. *The Six Carpenters' case*, 8 Co. 146. That in 1
Raym. 188. it was holden that an action of trespass
 not lie for a nonfeazance. That the proper remedy in
 case was an action of debt or assumpsit.

1748,9.
 MOYSE
 against
 COCK-
 SEDGE &c.

time Serjt. in reply mentioned the cases in 1 *Rel. Rep.*
 and *Noy* 17.

be Court gave judgment for the defendants (a).

"The Court were clearly of opinion, 1st, That the 11. for the costs
 be legally and reasonably detained by the overseers, the sum not appear-
 pressive or extravagant. That a distress under the stat. 43 *Elm.* was
 considered not as a distress at common law, which is a pledge and de-
 but as it was saleable that it was in the nature of an execution, and
 the necessary expences were incidental. That statutes made in favor
 arity ought to have a benign and large interpretation, *Yelv.* 176. Nay
 he stat. 43 *Elm.* gave power to imprison even for a penny; and who is
 at the expence? That it would be absurd that a parishioner who refused
 y 6d., should put the parish to the expence of 40s. to levy it.
 y, That in this case the action was misconceived; for here was no irre-
 ty committed according to the stat. 17 *Geo.* 2. c. 38; no misfeazance.
 bare nonfeazance will not make a man a trespasser. That that sta-
 was made in favor of officers; and if the plaintiff had any right to the
 t must be in the nature of a debt, for which assumpsit will lie and not
 us (1). *The Six Carpenters' case*, 8 Co. 146. is material. A sheriff,
 evies money on a just execution and does not pay it over, is no tref-
 , 1 *Ld. Raym.* 188. Judgment for the defendants *per totam Curiam.*"
Abbey J.

(1) *Presly v. Dawkins*, H. 11 W. 3. Bull. N. P. 45. S. P.

1750.

M. 24 G. 2. WILLIAM ELLIS *against* WILLIAM ROWLES and
 Friday, RICHARD WYEMAN.
 Nov. 23d.

[T. 21 GEO. 2. Rol. 1722, 3, & 4.]

Defendant
 in a plea just-
 ified taking
 cattle *da-*
mage feasant,
 and after-
 wards re-
 joined that
 they were
 taken *fur-*
charging the
 common;
 held to be a
 departure.
 —If a com-
 moner, hav-
 ing right of
 common for
 one beast,
 put on two,
 the lord can
 only distrain
 the one put
 on last un-
 less they
 were both
 turned on
 together;
 and it must
 be shewn in
 a plea (justi-
 fying the
 taking as a
 surcharge)
 whether
 they were
 put on toge-
 ther or se-
 parately,
 and if the
 latter which
 was put on
 first.

TRESPASS for taking and impounding the plaintiff's cat-
 tle, to wit, one bullock and one ox.

As to all the trespasses &c. except taking the ox the de-
 fendants pleaded the general issue; and as to the ox they
 pleaded specially, that the Duke of *Newcastle* and others
 (naming them) were seised in fee of the manor of *Longney*
 with the appurtenances in the county of *Gloucester*, of
 which *Grainger's Moor* is part, and because the ox was
 feeding and doing damage there the defendants as servants of
 the Duke of *Newcastle* &c. by their command took the
 said ox in the name of a distress and impounded him.

The plaintiff replied that he was seised in fee of a messuage
 and twelve acres of land with the appurtenances in the
 parish of *Longney*, and prescribed for a right of common
 in *Grainger's Moor* for two cows or for one ox and one
 yearling beast at his election yearly upon and from the *Mon-*
day next after the third day of *May* until *Midsummer-day*
 then next following as to his messuage and lands with the
 appurtenances belonging; and then he stated that being so
 seised &c. on *Monday* next after the third day of *May* in the
 19th year of the reign &c. he put one ox into the said place
 &c. to use his said common there, which said ox was so
 using his said common there from thence until the defendants
 of their own wrong afterwards and before *Midsummer-day*
 then next following, to wit, on the 6th of *May* in the said
 year took and impounded the said ox &c.

Rejoinder, (admitting the right of common stated in the
 replication,) that the plaintiff before the said time when &c.
 and at the said time when &c. had of his own wrong in the
 said place &c. two oxen, to wit, the ox in the declaration
 mentioned and one other ox; that the said two oxen at the
 said

said time when &c. were in the said place &c. feeding on the
 the grafs there then growing, whereby the plaintiff at the
 said time when &c. had overcharged the said common with
 the said ox in the declaration mentioned; and because the
 said ox in the declaration mentioned at the said time when
 &c. was in the said place &c. feeding &c. and furcharging
 the common there and doing damage there as aforefaid, the
 defendants as fervants of the Duke of Newcastle &c. (leav-
 ing the said other ox of the plaintiff in and upon the said
 place &c. which he of right ought to have and depasture
 there in right of his said meffuage and lands with the appur-
 tenances as aforefaid to use his said common of pasture at
 the said time when &c.) took the said ox in the declaration
 mentioned in the said place &c. fo feeding on the grafs
 there then growing and furcharging the said common there
 and doing damage in the said place &c. in the name of a
 diftreff for the said damage there then done and doing by the
 said ox, and impounded &c.

1750.

 ELLIS
 againſt
 ROWLES.

To this there was a *Surrejoinder*, in which the plaintiff
 claimed a right of common on *Grainger's Moor* for two
 oxen: but as the surrejoinder was abandoned by the plain-
 tiff's counſel in the courſe of the arguments, it is not given
 here.

The defendants demurred generally to the surrejoinder.

This caſe was firſt argued on the 6th of *June 1749* by
Draſer Serjt. for the plaintiff and by *Bootle* Serjt. for the
 defendants, and now by *Bellfield* Serjt. for the former and
Willes King's Serjt. for the latter.

Two objections were taken to the rejoinder by the plain-
 tiff's counſel; 1ſt, That it was a departure from the plea;
 that the defendants in their plea replied on the damage fea-
 ſant and in their rejoinder on a ſurcharge of common,
 which did not fortify the matter contained in, but was a
 departure from, the plea; *Co. Lit.* 304. a; *Doctr. Plac.*
 124. "*Departure*"; and that the defendants might have
 pleaded the ſurcharge of common at firſt. 2dly, That it
 did not appear by the rejoinder that the defendants had a
 right to diſtrain *this* ox; for that as it was admitted on the
 record that the plaintiff had a right to put one ox on the
 common

1750.

ELLIS
against
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common the defendants ought to have alleged that the plaintiff first put on one ox and afterwards the ox in question, and that they distrained the latter as a surcharge, unless they were both turned on together; but that at all events it ought to have been stated one way or the other, either that they were turned on together or that the one was put on first and then the other and that the second was taken as a distress, for the lord has not his election to take which of the two he pleases unless both were put on together.

In answer to these objections it was urged, 1st, That new matter may be inserted in a rejoinder if it support the plea, and that the matter disclosed in this rejoinder did support and fortify the plea. *Dixon v. James*, 2 *Lutw.* 1238. 2dly, That it was not necessary for the defendants to shew which of the two oxen was first turned on, it being a sufficient justification in the lords in taking the distress that there were two oxen on the common instead of one; and that it was difficult for the lords to prove which was first turned on.

But *The Court* (Lord Chief Justice *Willes* and *Burnett* and *Birch* Justices, Mr. Justice *Gundry* being absent) were of opinion that both the objections were well founded. First, that the rejoinder was a departure from the plea; for that there was a great deal of difference between damage feasant and a surcharge of common. That the surcharge might have been pleaded at first, *Salk.* 221., because the defendants then knew the plaintiff's right, in which respect this case was different from that cited from *Lutwyche*. Secondly, That it ought to have been stated in the rejoinder whether the oxen were turned on the common together or separately, and if the latter which of the two was first turned on; and that it did not now appear whether or not the defendants were justified in distraining the ox in question (a). And they gave

Judgment for the plaintiff.

(a) But it does not appear that either of these objections was taken in a subsequent case, *Hall v. Harding and Others*, E. 9 Geo. 3. B. R. 4 Burr. 2426; and 1 *Bl. Rep.* 673. There in replevin for taking the plaintiff's sheep on *Whitman's Down* the defendant avowed taking the cattle doing damage to his right of common; the plaintiff in his plea in bar claimed a right of common

on for himself, as tenant of eight acres of land, for two sheep for every the defendant (admitting the right of common claimed by the plaintiff) d that at the time of the distress the plaintiff had sixteen sheep on the ion over and above the sixteen that were distrained, that the defendant a first mentioned sixteen to use the common and only distrained the sum- merary sixteen with which the plaintiff had overcharged it, of his own g and which were doing damage to the plaintiff; and the only question was whether one commoner can distrain the cattle of another common- o had overcharged beyond his stinted number, which was determined in gative; and the plaintiff had judgment.

1750.

ELLIS
against
ROWLES.

CHARLES POLE *against* GEORGE FITZGERALD; E. 15 Geo. 2.
in Error.

[Hil. 20. Geo. 2. B. R. Rol. 32.]

Friday,
May 8th.
Exchequer
Chamber.

THIS case came by writ of error from the Court of King's Bench into the Exchequer-Chamber, where (after two a ship a pri-
ments by *Sewell* and *Henley* for the plaintiff in error, and vateer) at
Jume Campbell and *Ford* for the defendant in error) the and from Ja-
unanimous opinion of the latter Court was now delivered, as maica to any
ws, by ports &c. at
Tilley, Lord Chief Justice, C. B. "It is a very great sea or shore,
ern to me that I differ in opinion from the four Judges cruising for
ie King's Bench, for all of whom I have the greatest months
ect: but my concern is the less, as I am supported in my without fur-
ion by seven other Judges, for whom likewise I have a ther account
great regard. &c. and free
from ave-
rage, (be-
fore stat. 19
Geo. 2. c.
37.) the in-
sured had
interest in
the ship to
the amount
insured;
during the
four months
the crew
mutinied,
brought the
ship by force
into Jamai-
ca, and hav-
ing carried
away the de-
arms &c. de-
serted her,
by which the
further
cruise was
four months.

efore I deliver our opinion, in order to come at the point
estion it will be necessary to state the pleadings and the
al verdict on which the question arises, which I will do
ortly as I can.

he action was brought in the Court of King's Bench by
Fitzgerald against *C. Pole* on a policy assurance under-
ten by the defendant for 100*l.* on a ship or vessel called
Goodfellow Privateer, and the plaintiff laid his case three
e. The cause was tried at the Sittings held for the city of
lon, and a verdict was found for the defendant on the
id and third counts, so they are now quite out of the case.
a special verdict was found on the first count, and on that
the present question arises. The policy of assurance is

T c

set

ated: as the ship was in safety in her proper port at the end of the
hat the assured could not recover.

1752. set forth verbatim in that count, but I will only state such parts of it as are material to the point in question.

FOLE
against
FITZ-
GERALD;
an Error.

The insurance was made on the 31st of *August* 1744 on the body tackle apparel ordnance munition artillery boat and other furniture of and in the ship or vessel called the *Geoffilo* Privateer, whereof *P. Joyce* was master, or whoever else should go as master, *lost or not lost*, from *Jamaica* to any ports and places whatsoever at sea or shore a cruising from port to ports and place to places for and during the space of four calendar months, beginning the adventure on the said ship &c. from and immediately following the 14th day of *June* then last, and to continue and endure until the said ship with all her tackle apparel &c. should arrive at any ports and places where and whatsoever or cruising from port to ports and place to places for and during the space of four calendar months, commencing as aforesaid; the said ship &c. for so much as concerned the assured was and should be valued (one half part of the said ship) at 1000*l.* without further account to be given by the assured for the same.

The perils, against which the insurance was made, were the usual perils, which are specified in policies of this sort, and it will not be material particularly to mention them. But it is material to take notice that they are all of them said in the policy to be such as had or should come to the hurt detriment or damage of the ship &c.

The money insured by the defendant was 100*l.* The premium he received was twenty guineas; and in case of loss the assured was to abate 2*l.* per cent; and the assurers were to be free from all average. These I think are all the parts of the policy that at all relate to the matter in dispute.

It is averred in the declaration that the insurance so made by the plaintiff was made for and on account of and in trust for and for the use and benefit of *P. Joyce*, and that the interest which the said *P. Joyce* had at the time of making the said insurance and during the said cruise in the said ship amounted to a large sum of money to wit to 2000*l.* and upwards; and

that the said ship on the said 14th of *June* being at *Jamaica* good safety set sail and departed from thence in and upon said intended voyage a-cruising, and that being so cruising there was a mutiny in the ship on the 23d of *September* 1752. and that against the will of the master and officers the ship she was seized taken restrained and detained by the rest part of the mariners then on board her and the commodities taken from the master, and she was not permitted to proceed on her voyage a-cruising any longer, but was carried again to *Jamaica* on the 30th of the same *September*, where the said mariners ran away from the said ship with goods belonging to her and totally quitted and deserted her, so that she could not and did not perform her said voyage during the said four months, but from the time of being so seized and detained during the residue of the said months was totally disabled to perform her said voyage, whereby the owners and proprietors of the said ship total- ly lost all benefit and advantage which might have accrued to them in and from the said cruise during the residue of the said months; and therefore the plaintiff demands 98*l.* by virtue of the policy.

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POLK
against
FITZ-
GERALD;
in Error.

The special verdict finds the policy just as it is set forth in the declaration, and that the defendant *Pole* underwrote 100*l.* on the 31st of *August* 1744. It finds likewise that the ship was taken at *Jamaica* on the 14th of *June* 1744, and sailed from thence on a cruise, and was an *English* privateer duly commissioned by the Admiralty here; and that during the said time there was a war between *Great Britain* and the *Kings* of *France* and *Spain*; and that on the 10th of *July* the said ship in her cruise took a *French* ship of the value of 4200*l.* made prize thereof. That on the 31st of *August* *P.* the captain fell ill, and was obliged to quit the ship without the consent of all the crew; and that *John Hussey* the lieutenant was by the consent of the captain and all the officers appointed commander thereof, and that the said ship sailing on her cruise from a port called *The River of* *St.* to fetch water, and within the said four months, on the 23d of *September* 1744 the crew of the ship mutinied against their commander and officers and by force carried her against their will back towards *Jamaica* and before her arrival in port there seized the boat fire arms and

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against
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cutlasses belonging to the said ship, and carried off the same, and deserted the said ship, by which the cruise was totally prevented and lost for the remainder of the said four months from the said 23d of September. It is further found that the ship on the 29th of September 1744 arrived at *Jamaica*, and was there in good safety, at and after the end of the said four months, but was prevented by the said mutiny and desertion from further pursuing her said cruise. It is likewise found that the insurance was made for the account of *P. Joyce* the owner and captain of the said ship, *and that he during all the time of the said cruise had interest in the said ship to the amount of the sum insured.* And on these facts the jury submitted the point in question to the judgment of the Court of King's Bench, who have given judgment for the plaintiff.

Upon this special verdict two questions arise,
1st, Whether this were an insurance on the voyage, or only an insurance on the ship;

2dly, Even taking it for granted that this was an insurance on the voyage, whether the plaintiff can recover in this action.

The first is the principal question, and that which was chiefly litigated by the counsel; the second was but just hinted at. And therefore I shall speak more fully to the first, and likewise for this reason, that if we determine that one way, there is undoubtedly an end of the matter in dispute; for if this were not an insurance on the voyage, but on the ship only, it is not pretended that the plaintiff can recover in this action. For as the policy is made *free from average*, in that case to entitle the plaintiff to recover, there must be a total loss of the ship: whereas it is expressly found that the ship was in safety at *Jamaica* at and after the end of the four months.

And as to the first point, we are all of opinion that the insurance was not on the voyage but on the ship, for the following reasons;

1st, Because it is contrary to the nature of an insurance to contrive this to be an insurance on the voyage.

2dly,

2dly, Because from every part of this policy it plainly appears to have been the intent of the parties that the insurance should be only on the ship 1752.

3dly, Because if this policy were to be construed otherwise, great absurdities and inconveniences would ensue.

And lastly I shall consider all the cases that were cited which are any ways material to the point in question, and shall shew that none of them are authorities for the plaintiff, but that several of them are express authorities for the defendant.

POLE
against
FITE-
GERALD
in Error.

First; The construction contended for by the plaintiff is contrary to the nature and the original design of insurances. They were at first invented for the benefit of trade, that if a merchant miscarried in one voyage he might not be ruined for ever, but by giving premiums to other persons to insure either his ship or his goods, the loss (if it happened) might be divided amongst them, and so the merchant might be enabled to try his fortune in another voyage. So that insurances were contracts of indemnity and not for profit or gain. It were endless to cite books to this purpose, but I will mention two very celebrated authors, *Roccus de Affecutionibus*, and Monsieur *Cleirac* in his treatise called *Guidon*, who define an insurance in this manner. The first says "Affecutio est contractus quo quis alienæ rei periculum in se suscipit, obligando se sub certo pretio ad eam compensandam si perierit." The other is in *French*, but I chuse rather to put it into *English*, "An insurance is a contract, by which there is an indemnity of things transported by sea from one country to another." These definitions plainly shew that the nature of an insurance is as I have before mentioned. And therefore by the laws of most foreign countries insurances were to be made only on part of the ship or goods, and they were not allowed to be good in any foreign country (nor here till of late years) if they exceeded the whole value of the ship or cargo. But indeed of late in *England* two other methods of insurance have been introduced of *interest or no interest*, and of *valued policies* which are little better than wages. But even of this sort I never before heard of any insurance *on a voyage*. And these sorts of policies have been found so far from being for the advantage of trade, that they have been very detrimental to it, and productive of great frauds, and therefore they are declared

1752. clared to be void by the stat. 19 Geo. 2. c. 37. I do not mention that statute as extending to the present case, because this policy was made before that statute. But I mention it to shew that these sorts of policies ought not to be favoured, or extended beyond the exprefs words of them; and there is no exception in the statute, which is material to the present case; for though there is an exception in respect to privateers, it is only of insurances made on the ships themselves.

POLE
against
FITZ-
GERALD;
in Error.

Secondly, in the next place, I think it plainly appears from the words of the present policy that it was the intent of the parties to insure only *the ship* with its appurtenances, and that they never thought of insuring the voyage. This insurance is said to be *on the ship, &c.* The perils specified in the policy are confined to such as may happen to *the ship, &c.* The ship, &c. is valued at such a sum. And I should think that even at the time of bringing this action the plaintiff and his advisers never imagined that the voyage was insured; because he has not averred in any part of his declaration that the person for whom the insurance was made was any ways interested in *the voyage*, but only that he had an interest in *the ship*. But this was (I suppose) an after-thought, founded upon a mistake in the resolution in the case of *Pond v. King*, of which I shall take notice by and by: and upon this foot it was insisted that, it being mentioned in the policy that the ship was to go on a cruising voyage for four months, the cruise and the voyage were the thing insured. But it is (I think) very plain and clear that these words, which were so much relied on by the plaintiff, were inserted in the policy for other reasons, and that they will not bear such a construction as is contended for by the plaintiff. The time was inserted for the benefit of the insurer, that he might not be obliged to make good the loss of the ship unless it happened within that time. And the mentioning that the ship might cruise or sail to or from any place or places within that period of time was inserted both for the sake of the insured and the insurer; for the sake of the insured, to prevent the insurer insisting on a deviation; and for the sake of the insurer, that the ship might not be employed in any service but cruising. For an insurer cannot know what premium to insist on, unless he knows on what service the ship is to be employed, whether on a more or less dangerous voyage; if therefore this ship had been employed during the four months

months on any other service but cruising, to be sure in case of loss the insurer would not have been liable. To shew the absurdity of the notion, that this expression of *cruising* shews that the insurance was on the voyage, I beg leave to put only one case, which is too plain to be disputed. Suppose a man insures on a ship to carry tobacco, from any place to *London*, she must carry tobacco, because if she might carry other things she might be in greater danger of being lost: but if by reason of a storm, or for any other reason, the tobacco be thrown overboard and lost, but the ship comes safe to *London*, was it ever thought that the insurance on the ship was to be paid? And yet this is exactly a parallel case with the present.

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against
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GERALD;
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Thirdly, What I have already said shews that the notion of an insurance on a voyage is absurd: but I will in the next place mention several other absurdities and inconveniences that would ensue if this construction should prevail. In the first place it would be a double insurance, both on the ship and the voyage; for if the ship were lost before the end of the four months to be sure the voyage is lost; and if the voyage be lost, according to the plaintiff's construction, though the ship (as in the present case) be in good safety at the end of the four months, yet the insurance must be forfeited. In the next place if the loss must be total, then if the ship be safe but one day or one hour during the four months the insurance will not be forfeited. On the other hand, if it may be partial, as to be sure an insurance for four months may be divisible into parts, a worse absurdity will follow; for though the ship in the first part of the voyage should take a prize of never so great a value, yet if she be prevented pursuing her voyage but one day at the last, the insurer must pay the money insured, which would be very absurd and unjust. And yet that is the present case; for it is found by the verdict that this ship took a prize in the beginning of her voyage of above double her value. There would likewise be another great absurdity and inconvenience; for it is certain that the only difference between these *valued policies* and *policies on interest or no interest* is this, that in one case the insured is not obliged to prove the quantum of his interest, and in the other he is not obliged to prove any interest at all: but in all other respects these and other policies are the same, and must be determined and construed in the same manner; and so it was expressly held by the Court of Common Pleas in the case

of

1752.
 POLY
 against
 FITS-
 GERALD;
 in Error.

of *De Paiba* and *Ludlow* (a). Now if this were a policy without either of these clauses, and the insurance were upon the voyage, how is it possible to prove what the loss is? for a ship in a voyage of four months, may take a prize of a million value, or she may take no prize at all, or she may in that time be taken or lost herself; it is impossible therefore that such a contingency can ever be valued. From these observations it plainly appears what nonsensical sorts of things these insurances on voyages are: and if it were necessary to give my opinion upon them, I should think (according to my present sentiments) that if a policy were to be so drawn as that a voyage were insured by express words, such a policy would be void, both as illegal and unreasonable.

I come now, in the last place, briefly to take notice of several of the cases (b) which were cited by the counsel. The case of *Pond v. King* (c), which was determined in *R. H. 21 Geo. 2.*, besides that it is a very modern case, is as different from the present as possible. For though the words of the insurance are pretty much the same as the present, the ship there was totally lost, she having been taken by the *French*. And though she was retaken, and ordered to be restored to the owners on the payment of salvage, yet they never thought proper to pay the salvage, so never had the ship; and they certainly had their election, and were in the right to do so. For as by the terms of the policy the insurers were not to pay any salvage, if the owners had paid it, they must have paid it out of their own pockets, and would thereby have lost their claim on the insurers; they thought it therefore most to their interest to abandon the ship, and to sue the insurers for the money insured. So that we can determine the present case for the defendant without at all shaking the authority of *Pond v. King*. The case of *De Paiba v. Ludlow* in the Court of Common Pleas, 5 *Geo. 1.*, which was strongly relied on in the present case, and (as I am

(a) *Com. Rep.* 360.

(b) All the cases on this subject, both prior and subsequent, are collected by Mr. *Park* in his admirable treatise on *The Law of Marine Insurances*.

(c) 1 *Will.* 191. The report of this case in *Willson* is accurate, except in one particular; the clause at the end of the policy was this; "In case the ship should not be heard of in twelve months after the expiration of the said three months, the assurers agree to pay the loss; the assured to repay the money in case the ship should be afterwards heard of in safety."

informed)

informed) was much insisted on likewise in the case of *Pond v. King*, is no authority at all for the plaintiff, it having been determined on quite another point; for there the question, which was so much litigated, and which occasioned so much doubt with the Court, was whether the ship were lost or not, the property not being altered by the capture. But it was never once mentioned or imagined that the insurance was on the voyage; if it had, the other point need never have come in question. For there was no doubt but that the voyage was lost by the capture, whether the ship were considered as lost or not. That case therefore is rather an authority for the defendant, as it shews that the Court and counsel at that time had no notion of an insurance on a voyage. The cases of *Green v. Young*, 2 Lord Raym. 840, *Trantor v. Watson*, 6 Mod. 12, and an anonymous case in *Salk.* 444, were determined upon other points; and not a word was said in any of them of an insurance on a voyage. There was indeed a nisi prius case of *Berkley v. Cullen* cited and said to have been tried at *Guildhall* before Lord Chief Justice *Lee*, in which it was said that the Lord Chief Justice delivered his opinion, that though the ship were alive, the policy was forfeited, because the voyage was lost: but that case might certainly have been determined on another point; for the ship there was seized for his Majesty's use and turned into a hulk, and the owners never had her again before the end of the voyage; so that the ship was certainly to be considered as lost. And there is another nisi prius case, of which I have a report, which was tried in the King's Bench at the Sittings after *Trinity* term 1749, where though the insurance was for a month on a cruise, and the ship was taken by the *French* and detained for some time, so that the voyage was lost, yet as the *French* afterwards quitted her, and she came back safe to *Dartmouth* within the month, the jury (as I am informed) found a verdict for the defendant; and I never heard that the Judge found fault with the verdict, or that there ever was any motion to set it aside.

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against
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GERALD;
In Error.

Having said so much on the first head, and it being I think very clear that this was an insurance only on the ship, and not on the voyage, I shall say but very little on the second point, that if this were an insurance on the voyage yet that the plaintiff could not have judgment. And this is so very plain, that I think it cannot admit of a dispute; for it is cer-
tain

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tain that in valued policies the insured must shew that he had some interest in the thing insured, though he need not prove the quantum of his interest. Now in the present case it is only found that *P. Joyce*, the person on whose account the insurance was made, was *interested in the ship*, but it is not found that he had any interest *in the voyage*; nor could it be so found, since it is not so much as averred in the declaration. Now upon a special verdict no fact can be presumed, nay it must be presumed that there was no such fact proved, since a special verdict cannot find a negative (*a*). It is certain, and it has been a common case, that the owner of a ship has let his ship out to cruise as a privateer only at a certain rate, without having any share in the contingent profits of the voyage. And if the case were so, there was the more reason why he should insure his ship at a high rate, as such an enterprise is a very hazardous service, and the ship is in great danger of being taken or lost.

Therefore for both these reasons, we are all of opinion that the judgment of the Court of King's Bench must be reversed (*b*)."

(*a*) Vid. *Martin v. Jenkin*, 2 Str. 1144; and 1 Willj. 57.

(*b*) This case was afterwards carried up to the House of Lords, where this judgment of the Exchequer-Chamber was (on the 1st of March 1754) affirmed; eight of the Judges were for affirming, three for reversing it, and Mr. J. Burnett who died before judgment was actually given coincided with the eight.

M 26 Geo. 2 THOMAS JENKINS on the Demise of JAMES PROS-
Nov. 15th. SER otherwise JENKINS *against* MARTHA JEN-
KINS.

[Hil. 24 Geo. 2. Rol. 794.]

A. gave an
annuity to
B. for her
life, to be
paid to her
out of certain
lands by his
executor;
and then de-
vised those
lands to C. and appointed C. his executor: held that C. took an estate during the lifetime of the annuitant.

ON the trial of this ejectment for lands at *Yarkbill* and *Westbide* in the county of *Hereford*, a special verdict was found, from which these facts are taken.

On the 22d of July 1729 *John Jenkins*, being seised in fee of the premises in question, by will, after giving several pecuniary legacies, gave "to *Mary Harper* 5*l.* a-year to be

paid to C. and appointed C. his executor: held that C. took an estate during the lifetime of the annuitant.

1. If he did not take an estate in fee?

paid

paid to her out of the premises in question by his executor as long 1752.
 as she should live, and to be paid quarterly"; and he gave to
John Jenkins son of his brother *David Jenkins*, "all his
 lands goods and chattels with his money out upon bills and
 bonds," and appointed him sole executor. After the devi-
 sor's death, to wit, on the 2d of May 1730 *John Jenkins*
 the devisee entered, and on the 1st of July 1750 died leav-
 ing *John Jenkins* his eldest son, and several other children.
 The premises in question are of the yearly value of 16*l*.
James Prosser, otherwise *Jenkins*, is the heir at law of the
 devisor; and the defendant is the tenant of *John Jenkins* the
 son of the devisee.

After two arguments at the bar by *Prime* (a) and *Willes*
 (b) King's Serjeants for the plaintiff, and *Poole* and *Wynne*
 Serjeants for the defendant, the opinion (c) of the Court was
 delivered by

Willes, Lord Chief Justice. (After stating the special
 verdict.) "The question is whether the executor, *John*
Jenkins, took a larger estate by the will of the devisor
John Jenkins, or only an estate for life, in the premises in
 question. If he took an estate for his own life only, he being
 dead the lessor of the plaintiff as heir at law to the testator
 is entitled: if he took a larger estate, it must be either an
 estate in fee or an estate during the life of the annuitant; and
 be it which it will, as the annuitant is still living (d), the les-
 sor of the plaintiff cannot recover.

Three rules were laid down and agreed by the counsel
 on both sides, by which it was said this case was to be deter-
 mined;

1st, That an heir at law shall not be disinherited but by
 express words, necessary implication, or manifest intent;

2dly, That every devise must be considered as intended to
 be beneficial to the devisee;

3dly, That every devisee, who is to pay any thing out of
 an estate, must have such an interest in the estate as will ena-

(a) On the 31st of January 1752.

(b) On the 15th of November 1752.

(c) It does not appear on what day the judgment of the Court was delivered:
 but it was after the 15th of November.

(d) It did not appear on the special verdict whether the annuitant were liv-
 ing or dead: but the defendant's counsel insisted (and that argument was now
 adopted by the Court) that as the plaintiff could not recover during the life-
 time of the annuitant, the Court could not presume her death on a special verdict.

1752.

ble him to pay it, otherwise the intention of the deviser will be frustrated. And we agree that these are all right rules.

T. JEN-
KINS
dem. J. JEN-
KINS
ag. J. JEN-
KINS

If therefore it be not the plain intention of the deviser, appearing on the face of the will, that the executor should have a larger estate, we should have been of opinion that the executor would only have had an estate for life. But we are of opinion that it plainly appears that the deviser intended to give him a larger estate.

As to the second rule, we do not much rely on that, for as in this case the executor is to pay the annuity of 5*l.* out of the estate, and as the estate is found to be worth 16*l.* a-year, he cannot in any case be a loser. But we found our opinion on this, that, as the annuity is to be paid by the executor and to be paid out of the estate, the intent of the deviser cannot take place, unless the executor has at least such an estate in the lands devised as will last as long as the annuity is payable. Whether he has an estate for the life of the annuitant only, or in fee, we need not determine in this action, because the annuitant is alive: but we are rather inclined to think that he took an estate in fee, because there is no one case where a devise by virtue of the word "paying" has been adjudged to have a larger estate than for his own life, in which it has not also been adjudged that he took an estate in fee (a).

There are so many cases upon this head, most of which were cited upon the argument of this case, that make for the defendant, and the matter has been so often determined, and is now so well settled, that I shall only just mention the names of some of these cases, and shall state only one case particularly which was cited on the part of the plaintiff in order to lay it out of the way, because we think that it is no authority at all in the present case. This case I mean is that of *Ansley v. Chapman*, reported in *Cro. Car.* 157.

(a) See *Doe d. Beasley v. Woodhouse*, 4 D. & E. 89. There the deviser gave his real and personal estates to his wife for life, and directed part of the personalty to be sold after his wife's death, and divided between five persons; he then gave two annuities to A. and B. to be paid by his executor out of his whole estate, and to commence after his wife's death; and he then devised "the remainder of the profits, after his wife's death and after the yearly payments to the annuitants, out of his whole estate, to C, D. and E. equally, share and share alike;" and it was holden that the executor took a fee.

but

more fully by the name of *Amesley v. Chapman*, in Sir Jon. 211. There a man devised several estates to his sons, without saying what estate they should have in, but directed that they should bear part and part alike pay out of his houses and lands devised to them to his 40*l.* a-year during her life, which he was bound to as appeared by indenture, covenant, and obligation; and was holden that they took only estates for life, because 40*l.* a-year was charged on the lands before, and therefore could not be discharged by his will, and into whose hands soever the estates fell they must be charged with this duty; and that the will only contained directions to the heir in what manner they were to pay it whilst they enjoyed their several estates in the land.

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T. JEN-
KINS dem.
J. JEN-
KINS
against
M. JEN-
KINS.

The cases on the other side are so numerous that it would be too long to spend time to go minutely through them in so many cases as this is: but I will just mention the names of some (a) of the principal cases. *Collier's case*, 6 Co. 16; *Cro. Eliz.* 378; *Spicer v. Spicer*, *Cro. Jac.* 527; *Wilkes v. Hammond*, 3 Co. 20, 21; *Greeve v. Dewel*, *Cro. Jac.* 527; *Weble v. Hearing*, *ib.* 415, 416; *Lee v. Withers*, Sir Jon. 107, and *Pollexf.* 539; *Read v. Hatton*, 2 Mod. 156; and *Fraser v. Lea*, 2 Lev. 249; the two last of which are very strong authorities in point, but I think that the present case is so very plain that it does not want them.

It was said for the plaintiff that, if the executor had died in the lifetime of the testator, this annuity would have been a vested legacy, which shews that it was no charge on the estate, but must die with the executor: whether this would have been so or not, it will be time enough to determine when such a case comes before us. But we think it is a circumstance not material in the present case.

Another matter directly contrary to this was likewise insisted on for the plaintiff, that this was a charge on the estate, and therefore would remain a charge on it in the hands of the heir after the executor's death. But I think

See also *Moore d. Fagge v. Hoefman*, Hil. 12 Geo. 2. sup. 140, 141. In the cases there referred to.

otherwise,

1752. otherwise, because it is directed to be paid *by the executor*; and because, if so, the annuitant would have no remedy against the heir for a breach of the condition: he has a remedy against the executor and his heirs for a breach of the condition, and the heir may enter for the benefit of the annuitant. But if it be considered as a condition annexed to the estate of the heir, no one can enter on the heir for the condition broken; and if they are construed as words of limitation, it will be exactly the same thing, because the estate is not limited over to any other person.

T. JEN-
KINS dem.
J. JEN-
KINS.
against
M. JEN-
KINS.

As to the observation, that it is only said to be paid *by the executor*, and *his heirs* are not mentioned, we think that of no weight; for saying that his executor is to pay it is only descriptio personæ, and is just the same as if he had said to be paid by *John Jenkins*.

For these reasons we are all of opinion that judgment must be for the defendant."

H. 26 Geo.
2.
Wednesday,
Feb. 12th.

DRAKE V. WIGLESWORTH.

[Hill. 23 G¹⁰. 2. Rol. 630, 631.]

A custom, that all the householders in the parish of A. shall grind all their corn which shall be used by them ground within the parish, is good: but a custom that they shall grind all their corn used or sold is bad.

Such an obligation on an occupier of one of such houses is not extinguished by one of our Kings having been formerly seized in fee of such house and of the mill at the same time.

Qu. If it would not have been extinguished by the King's having *inhabited* such house?

(a) It is not necessary to state that it is an ancient mill. *Coryton v. Lisleby*, 2 Saeud. 112.

THIS was an action on the case, in which the plaintiff (amongst other counts) declared that on the first of August 1747 and before he was and from thence hitherto had been and still was lawfully possessed of and in a certain ancient (a) water corn-mill called *Barnoldswick Mill* with the appurtenances situate and being in the parish of *Barnoldswick* in the county of *York*, and by reason thereof had and ought to have for all the time of his possession as aforesaid toll of all corn ground in the said mill, and that all householders and occupiers of dwelling-houses within the parish of *Barnoldswick* aforesaid during all the time of the said plaintiff's possession of the said mill with the appurtenances of right ought to have ground and still of right ought to grind at the said mill all their corn after the grinding thereof used and expended in their respective houses and to pay to

the custom is unreasonable and against reason at the beginning of it; for for some things no reason can be given; and *per Curiam*, the custom is good. As to the beginning of customs, it was said by Lord Coke in *Gateward's case* (a) (speaking of the difference between prescriptions and customs), "Every prescription ought to have by common indentment a lawful beginning, but otherwise it is of a custom; for that ought to be reasonable, et ex certâ causâ rationabili (as *Littleton* saith) usitata, but need not be intended to have a lawful beginning, as custom to have land dévifable, or of the nature of gavelkind, or *Borough-English &c.*" In *Harbin v. Grene, Moor 887* (b), the custom was only holden to be bad, because it was laid that they were to grind all their corn *which they sold* as well as what they consumed in their houses.

1752, 3.
 DRAKE
 against
 WIGLES-
 WORTH.

As to the objection, that it cannot be extinguished, for which was cited 6 Co. 59. *Gateward's case*; that is only said of right of common, but not of other rights.

I admit that there must be a mutual consideration; and in this case, to be sure, if a man is obliged to grind at a mill, the owner of the mill must keep it in order with all necessities. And if this declaration had been in the old way on the custom this must have been set forth, otherwise on a demurrer the declaration would have been held bad: but this action being on the possession only, it need not be set forth in the declaration, but the custom must be proved at the trial, and enough proved to shew that it was a good subsisting custom, otherwise the plaintiff could not have had a verdict: but we must take it that it was so proved here, because it is so stated in the case. We are therefore of opinion that this is a good custom (c).

As to the second question whether on the state of the case there was any unity of possession that destroyed the plaintiff's right, we are of opinion that there is not.

(a) 6 Co. 60. b.

(b) Hob. 189. S. C.

(c) See *Cort v. Birkbeck*, Dougl. 218. oct. ed.

1752, 3.

DEARE
against
WIGLES-
WORTH.

We are not quite agreed whether the word *seisin* implies *possession*: but if it does, we think it does not destroy the custom; because we take it to be a custom, not annexed to the estate, but, personal, to the inhabitancy. And therefore taking it for granted that *seisin* implies *possession*, it does not imply *inhabitancy*; and if the King did not inhabit the house (which is not stated, and it cannot be presumed that he did,) it is not such an unity as will affect the present case.

It is plain that this is not annexed to the house; for if so, none but ancient houses could be affected by the custom: but the custom is clearly not confined to *ancient* houses, for if a man live in a new-built house, he is bound to grind his corn there; I think therefore this is not improperly called *lex loci*. This has been compared to a right of common and a way: but I think it is not like either, because common is a profit out of the land, a way is an easement; and a man cannot have an easement in his own land, nor have the whole of the profits and part. And yet some rights of common have been holden not to be extinguished; as it is said in many of our old law-books that common appendant is not extinguished, though of late it has been holden otherwise (a). And some rights of way are not, as a way to a church or a Market; it was so held in 1 *Roll. Abr.* 936. pl. 10 & 13; 6 *Co. Gateward's* case; 3 *Bulstr.* 339, *Sbury v. Pigot*, and in the same case reported in *Poph.* 166. That was the case of a watercourse; and it was holden in both cases that the right to a watercourse is not destroyed by unity of possession, 1st, because it is natural, and 2dly, because of the necessity. And this case much more resembles the case of a watercourse and a way to a church than the cases of commons and general rights of way.

We are therefore of opinion that this right is not destroyed by any unity of possession stated in the present case, and that therefore the plaintiff must have his judgment."

(a) Vid. 4 *Co.* 38. a.

1752, 3.

EDWARD BARKER and JAMES COOKE *against*
 THOMAS Bishop of LONDON, CALEB LOMAX,
 and DANIEL BELLAMY Clerk.

Hil. (a) 26
 Geo. 2.

[Tr. 24 GEO. 2. Roll from 781 to 796.]

THIS was a quare impedit brought by the two plaintiffs jointly; but *Cooke* was summoned and seivered; and then *Barker*, an infant, by his next friend *E. Radcliffe*, declared alone.

The count deduced a title to the advowson from the reign of *Charles the Second* to *H. Killigrew* in 1693; and then stated that *H. Killigrew*, being seised in fee of the advowson, on the 8th of *December* 1704 by will devised to his wife *Lucy* for life, and died in *December* 1712; whereby *Lucy* his widow became seised of the advowson in gross as of freehold for the term of her life, and the reversion descended to *Lucy*, *Mary*, and *Judith Killigrew*, the daughters and coheiresses of *J. Killigrew*, whereby. they became seised of the reversion in gross as of fee in coparcenary. That on the 8th of *August* 1716, *Lucy's* (the daughter's) third part of the advowson was settled, subject to the widow's life-estate, on *James Cooke* on his marriage with *Lucy Killigrew* for his life, remainder to the wife for life, with divers remainders over. That on the 3d of *February* 1726 *Mary Killigrew* married *E. Barker* (the father of the plaintiff), whereby *E. Barker* and *Mary* his wife in right of the said *Mary* became seised of *Mary's* third part of the advowson. That during the life of *Lucy*, the widow, on the 1st of *October* 1728, the church became vacant by the death of *E. Fotbergill* the then incumbent, whereupon one *Caleb Lomax*, usurping on the title of *Lucy* the widow, presented *J. Romney* who was admitted, instituted, and inducted. That on the 10th of *September* 1729, *Lucy*, the widow, died. That on the 8th of *June* 1730 the church became vacant by the resignation of *J. Romney*, whereupon the King, usurping on the title of *J. Cooke*, *E. Barker* (the father), and *Mary* his wife, and *Judith Killigrew*, presented the said *J. Romney*.

If A. and B., coparceners of an advowson, do not agree to present on a vacancy, A. the eldest (or her assigns) may present to the first turn, and B. or her assigns to the next. —And if, when A. and B. do not agree, C. (a stranger) implead A. only by quare impedit on a vacancy and recover, it is a bar to dit brought by B. against C. for that turn, though not for the next turn. 1 H. Bl. 412. S. C.

(a) It does not distinctly appear on what day the judgment was given, but it was after the 7th of *February* 1752, when the last argument was heard.

1752, 3. *ney*, who was admitted instituted and inducted. That on the 10th of *May* 1731 *Judith Killigrew* by will devised her third part to trustees, in trust for her sister *Mary Barker* for her life to and for her separate use, remainder to *E. Barker* (the plaintiff) in tail, with remainders over, and died on the 18th of *June* 1734. That on the 1st of *May* 1734 *Mary Barker* died, leaving *E. Barker* (the plaintiff) her only son, upon whose decease *E. Barker* (the plaintiff) became seised as of fee-tail in the third part, which had originally belonged to *Judith Killigrew*. That afterwards the church became vacant by the death of *J. Romney*, and still continues vacant, whereby it belonged to *James Cooke*, *E. Barker* (the father), and *E. Barker* (the plaintiff) to present &c. That on the 28th of *November* 1747, during the vacancy, *E. Barker* (the father) died, on whose death *E. Barker* (the plaintiff) became and was seised in gross as of fee-tail of and in the third part of the advowson, which was the father's (*E. Barker's*); whereupon it belongs to *James Cooke* and *E. Barker* (the plaintiff) to present &c. but that the defendants will not permit them, but unjustly hinder them &c.

BARKER
against
LOMAX.

The bishop only claimed the admission institution and induction of vicars to this church.

The two other defendants severally pleaded four pleas; but the third is the only one to which there was a demurrer.

The defendant *Lomax*, in his third plea, stated that in *Michaelmas* term in the 20th year of the reign of *George* the second he the defendant (then being under the age of twenty-one years) by *M. Lomax* his next friend impleaded *Edmund* then bishop of *London*, and one *D. Cresspin* Clerk, *James Cooke* one of the plaintiffs in this cause, and *Edward Barker* (the father of the other plaintiff), in this court by a writ of *quare impedit* &c; that *Edward Barker* (the father) died pending the said plea; and thereupon such proceedings were had against the three other defendants that he (*Lomax* the defendant in this cause) in *Hilary* term in the twenty-first year of the reign by the consideration of this Court recovered against *James Cooke* his presentation to this vicarage, by default of the said *James Cooke*; that, as the bishop only claimed the admission, he also recovered against the bishop, but execution was stayed &c; and that in the *Michaelmas* term following he also recovered against *Daniel Cresspin*, (stating the pleadings; the issue joined, the verdict, and the judgment;)

ment (a); on which, on the 13th day of *February* in the twenty-second year of the reign, &c. there issued a writ to the bishop, directing him to amove *D. Crespin* from the vicarage, &c. and to admit a fit person to the vicarage on the presentation of *Lomax* (the now defendant); by virtue whereof the bishop removed *D. Crespin*, and at the presentation of *Lomax* (the now defendant) admitted and instituted *D. Bellamy*, (the other defendant) who hath ever since been and still is parson, &c.;—averring that *James Coske*, *Edward Barker*, (the father) and *Edward Barker*, (the son) in the lifetime of *Edward Barker* (the father) never did agree among themselves to present a fit person to the church, and that *J. Cooke* and *Edward Barker* (the son) after the death of *E. Barker* never did agree among themselves to present, &c.

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BARKER
against
LOMAX.

The third plea of the defendant *Bellamy* was the same, mutatis mutandis.

To these pleas there was a general demurrer.

The case was argued the first time by *Bootie* Serjt. for the plaintiff, and *Poole* Serjt. for the defendants on *Thursday* the 13th of *June* 1751, and the second time by *Prime* Serjt. for the former and *Draper* Serjt. for the latter on the 6th and 7th of *February* 1752. The Court took time to form their opinion, which was afterwards delivered as follows, by

Willes, Lord Chief Justice. "As the pleadings are very long, I shall only state such parts of them as are material to the point in question. The bishop claims nothing but as ordinary, so there is a judgment as of course against him. The defendants *Lomax* and *Bellamy* have pleaded severally four pleas, but the same in effect; issues have been joined on the first second and fourth pleas, and found for the defendants; two of them by a jury and the other by a certificate of the bishop (b). But there is a general demurrer to the third plea; and it is that only that now comes before the Court.

(a) That case gave rise to the question in *Beres* 139, whether or not in quare impedit the plaintiff were entitled to costs. See also *Thrale and Others v. The Bishop of London and Others*; 1 H. Bl. Rep. 530., where it was holden that a defendant in quare impedit, who obtains judgment on demurrer, is not entitled to costs.

(b) This was a certificate of the institution, &c. of one *Perkins*, stated in the pleadings.

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against
LOMAX.

I shall therefore only state the plea. (His Lordship here stated it.) This plea concludes with an averment that *Edward Barker* the father in his lifetime and the plaintiff *Coke* never did agree to present a proper person, and that *Edward Barker* the plaintiff and *Coke* never did agree since the death of *Edward Barker* the father to present, and this is confessed by the demurren.

This is the case of copartners, or their assigns, who according to the express words of Lord *Coke* (which I shall mention by and by) stand on the same foot in respect to this question as the copartners themselves. If ~~this~~ were the case of tenants in common, I own it would be a case of very great difficulty, and it would be necessary that we should take more time to consider the several cases that have been cited in respect to tenants in common, and the doctrine of summons and severance, which is a very nice point. But we think that we can determine this case on a very plain point, and without entering into consideration of these matters at all.

I cannot say that there is any case exactly in point to warrant the judgment that I am going to give; but there is no case against it, and so we are at liberty to give our judgment as we please; and we think that it is warranted by reason and justice; and likewise supported by the authority of some cases which are very like this, though they do not quite come up to it. And the opinion which we are of is this, that this being the first turn, to which *Coke* had a right to present as he married the eldest copartner; and as it is agreed that he and *Barker* did not agree to present, the judgment against *Coke* will be a bar to a quare impedit brought by *Barker* to present to this turn, but that it will not at all effect his right to present after the next avoidance.

As *Barker* was not a party to that suit, it is not reasonable that he should be at all affected by a judgment by default against *Coke*. But he ought neither to be in a better or a worse condition than if there had been no such suit or judgment. He would be in a better condition if he could present to this turn, and in a worse if his right to present to the next turn would be at all affected; but we think that he will be neither.

Lomas

Lomax cannot claim any right to present to the *next* turn 1752, 3. by virtue of a judgment in a suit to which *Barker* was not a party, and *Coke* cannot claim a right, because he has suffered *Lomax* to present to his turn.

BARKER
against
LOMAX.

Besides the reason of the thing, I shall mention two or three passages in *Coke*, and three or four cases in the old books, which we think warrant this opinion. As to the doctrine of joint-tenants and tenants in common, I shall not intermeddle with it, because neither of these is the present case; and there the right of advowson is entire, which it is not in the case of partners, especially when they do not agree to present the same person: but I shall confine myself to such passages and cases as relate to partners or their assigns.

Co. Lit 186. "If two or more coparceners be, and they cannot agree to present, the eldest shall present, and if her sister doth disturb her, she may have a quare impedit against her; and so shall the issue and the assignee of the eldest; and in the same manner the tenant by the curtesy of the eldest shall present (a)." By the stat. 2 *Westm. c.* 5. it is enacted thus, "Cum advocatio descendit particibus, licet unus bis presentet et usurpet super cohæredem, non propter hoc exclusus sit ille in toto qui fuit negligens sed alias habeat turnum suum præsentandi cum acciderit." And Lord *Coke* in his comment on that statute, 2 *Inst.* 365, says, "By the common law, if an advowson descend to divers coparceners, if they cannot agree to present the eldest shall have the first turn and the second the next, et sic de cæteris; every one in turn according to seniority, and this privilege not only extends to them and their heirs, but to the several assignees (b), whether by conveyance or by act in law as tenant by the curtesy. And if any stranger usurp on the turn of any one of them, this does not put the other out of possession; and this law doth extend to usurpations as well before partition as after." The same doctrine is expressly laid down in 2 *Roll. Abr.* 246. G.; and many cases out of the year books are cited to this purpose.

(a) See note 2 in *Co. Lit.* 166. b. by the late learned editor.

(b) *Harris v. Nichols*, Cro. Elm. 18. S. P. per *Meads*, *Windham*, and *Perrins*, Justices; dubitante *Anderson* Ch. J.

But

1752, 3.

BARKER
against
LOMAX.

But the two cases on which I principally rely are in *Bra. Abr.* tit. *Presentation*, f. 26. 24 E. 3; and *Bra. Abr.* tit. *Quare impedit*, pl. 118. 2 H. 7. The former is thus *A.* and *B.* have a right to present to a vicarage by turns; *A.*, whose turn it was, let the living lapse to the bishop who collated a person to it, and upon his death *B.* presented; and held that he had a good right; for that *A.* by letting the living lapse to the bishop had lost his turn, and that it should not be any prejudice to *B.* The other case was this; four copartners of an advowson; the first daughter presents to the first avoidance; the second daughter to the second; and on the third avoidance a stranger usurps on the third daughter and presents by usurpation; and such presentee was instituted and inducted and died; the fourth shall not lose her turn by the third daughter's suffering a stranger to present by usurpation, but shall present to that avoidance; in this the whole Court agreed; though they doubted about some other points of the case.

On these cases we think we may found our present opinion, and consider this judgment upon the same foot as an usurpation or a lapse; and I think it is rather stronger than either; for it is in nature of a grant or release to *Lomax* of this turn in the strongest manner that can be.

Upon this foundation we are of opinion that judgment on this plea must be for the defendants; and shall be of opinion that *Barker* has a right to present to the next turn if ever that matter shall come judicially before us (a)."

(a) See *Thrale and Others v. The Bishop of London and Barker*, 1 H. Bl. Rep. 376, where the question arose on *Barker's* right to present.

1755.

PENDOCK on the Demise of WM. MACKINDER
against MILDRED MACKINDER and Others.

H. 28 G. 2.
 Saturday,
 February 1.

ON the trial of this ejectment in *Kent* before Mr. J. Denison a verdict was given for the plaintiff, subject to the opinion of this Court on the following case.

The lessor of the plaintiff claimed a fourth part of certain premises in the declaration mentioned, being of the nature of gavelkind, as one of the brothers and coheirs in gavelkind of *J. Mackinder* deceased who died seised thereof in fee. The defendant *M. Mackinder*, under whom the other defendants held, claimed under the will of *J. Mackinder*, (who was her husband,) dated *September 23d 1750*, duly signed sealed and published, and attested and subscribed by three witnesses namely *T. Turner*, *Joseph Jeffery* and *J. Fletcher*. *J. Fletcher* being produced as a witness proved the will to have been signed sealed and published as above; but the plaintiff's counsel objected that the will was inefficual to pass lands because *Jeffery* at the time of publishing the will was not a credible witness within the words and meaning of the statute of frauds, 29 *Car. 2. c. 3. s. 5.*, he having been convicted of petit larceny; and a copy of the record of conviction was produced in evidence by which it appeared that *Jeffery* had been convicted in 1729 of stealing to the value of 10 *d.* for which he was sentenced to be whipped. The question reserved for the consideration of the Court was, whether *J. Jeffery* after such conviction and judgment could be deemed a credible witness to attest and subscribe a will of lands within the words and meaning of the statute of frauds.

A person convicted of petit larceny not a competent witness; nor a credible witness to attest a will, under stat. 29 *Car. 2. c. 3.*—It is the crime, and not the punishment, that makes a man infamous. 2 *Wils. 18. S. C.*

This case appears to have been argued on three several days 6th of *February*, 17th of *May*, and 27th of *June 1754*, on the two former by *Wynne* Serjt. for the plaintiff and *Poole* Serjt. for the defendant, and on the last by *Prime* Serjt. for the former and by *Willes* Serjt. for the latter. And on this day

Willes

1755.

PENDOCK
against
MACKIN-
DER.

Willes Ch. J. delivered the unanimous opinion of the Court after stating the case, as follows.

"There is but one single question whether or not *J. Jeffery* were a competent witness; for if not, he is not a credible one, and then there were but two witnesses to the will. And I shall confine myself to the question before us, because I have observed great mischiefs arise from judges giving obiter opinions. Therefore I shall not consider whether persons convicted of manslaughter and many other offences can be witnesses either before or after they have had their clergy, but shall speak only to this single question, whether a person convicted of petit larceny be a competent witness or not?"

But before I speak to it particularly, I will lay down this rule, which, though it has been sometimes disputed, is undoubted law and founded on the best reason, that it is the crime and not the punishment that makes a man infamous and consequently no witness. To illustrate this I could mention many instances, but shall only mention one which will make this point so very clear that I need mention no other. To be sure at common law infamous punishments were generally inflicted for infamous crimes: but there were some few instances to the contrary; and there have been more of late, as the law has been altered by several acts of parliament, and as some precedents have been made which I am sure I shall never follow. But, as I said, I will mention only one instance: the pillory has always been considered as the most ignominious punishment of all; and yet by 3 & 4 *W. & M. c. 10.* deer-stealers are to forfeit 30*l.* to be levied by distress and sale of goods, and if no distress the offender is to be set in the pillory. Now no one can be so absurd to say that if a deer-stealer is worth 30*l.* he is not infamous and may be a witness, but if he is not worth 30*l.* he is infamous and his testimony cannot be received. Of this opinion were those great judges Lord *Hale* and Lord Ch. J. *Treby*, as appears in 5 *Mod. 75. R. v. Davis and Carter*. And however this rule may interfere with some determinations that were formerly given in respect to other offences, it cannot contradict the judgment that I am going to give, for here both the crime and the punishment are infamous

Having

Having laid down this general rule, I will now consider the nature of petit larceny. No one certainly can be guilty of stealing but a man who has a wicked mind. Whether he steal things of more or less value, though the injury be greater or less to the party robbed, the wickedness in the felony is the same, nay I think rather greater where the thing stolen is of little value, for there the temptation is less.

1755

PENDOCK
against
MACKIN-
DER.

I shall now briefly consider the cases that were cited. *Co. Lit. 6. b.* Persons convicted of felony are infamous, and cannot be witnesses. *Ib. 158. a.* Such persons cannot be on a jury, for it is a maxim in law repellitur à sacramento infamis; which I think holds, for the same reason, as strong in the case of a witness as of a jurymen. In 3 *Inst. 218.* Lord Coke says that persons convicted of petit larceny might and had been put in the pillory at the discretion of the Judges; which shews that it was considered as an infamous crime. In 2 *Bulstr. 154.* a person attainted of felony is said to be infamous, and cannot be a jurymen or a witness. In 1 *Hale H. P. C. c. 43. p. 503.* grand and petit larceny are both felonies, and the nature of the offence is the same in both. So in 2 *Hale P. C. c. 37. p. 277.* a person convicted of felony is not a competent witness. In 1 *Hawk. P. C. fo. 95. f. 36.* petit larceny is felony; and 2 *Hawk. 432. f. 19.* persons convicted of felony cannot be witnesses. In trials per pais, there is an instance where the Chief Justice of the Common Pleas at the *Lent* assizes in *Suffolk 1657* would not allow a person convicted of petit larceny to be a witness. I put this case last, because it was only a circuit of opinion, and is taken from a book of no great authority. I could mention many more cases to the same purpose, but I forbear citing them, because no one case was cited on the other side where such persons had been allowed to be witnesses. The act of Grace 20 *Geo. 2.*, though insisted on at first, was immediately given up, because there is an exception in that statute of all persons convicted of felony before 1747.

For these reasons, and on the authority of these cases, we are all of opinion that *J. Jeffery* at the time of making the will of *J. Mackinder* was not a credible witness; that consequently

THAT the will was attested by two credible witnesses only and so by real estate could pass by that will; and therefore the defendants who claim under that will have no title. There fore the verdict given for the plaintiff must stand, and the goods must be delivered to him (a)."

By Act 31 Geo. 3. c. 35. it is enacted that no person shall be incapacitated by reason of a conviction for petit larceny.

PEARSON *against* ROBERTS and GROOM.

[HIL. 27 GEO. 2. Rol. 668.]

THIS was an action of replevin for taking the plaintiff's horse, to which the defendants pleaded, first, that the horse was taken by the plaintiff, and consequently that they were not liable for it; and at the trial at the Lent assizes at Bedford 1754 before Mr. Justice DENISON a special case was reserved for the consideration of this Court.

The defendants were surveyors of the highways for the parish of *St. Mary* in the year 1753, in which year the plaintiff was an inhabitant of the same parish occupying a corn field of 100 acres there of the yearly value of 22*l.* kept by him and there two carts, two waggons, and ten horses, and was also a miller and badger and in carrying his goods and in husbandry. Six days were duly appointed by the justices for the parishioners to go to the highways and do their respective duties, pursuant to the provisions of the several statutes. Pursuant to such appointment the plaintiff attended the highways with one cart furnished after the custom of the country, viz. with three horses and two men on each of the six days. But the defendants insisting that he ought to have done duty with two or three carts furnished with three horses and two men, made a complaint before two justices &c. who on hearing the complaint &c. adjudged that the plaintiff had been guilty of neglect of duty, and that he had forfeited 3*l.* namely 5*s.* for each of the said six days; and in order to levy the

penalty the justices granted a warrant of distress, directed to the defendants, who took and impounded the plaintiff's horse as a distress in order to sell him for the purposes of the warrant; whereupon the plaintiff levied his plaint in replevin, wherein the said action was to be determined, without having first demanded in writing the perusal or copy of the warrant.

1755.

PEARSON
against
ROBERTS.

The questions for the consideration of the Court were, whether the plaintiff were by law compellable to go with or to send more than one wain or cart on every of the six days;

If not, whether the plaintiff before the commencement of the action ought not to have demanded in writing a copy or perusal of the warrant of the justices?

If the Court should be of opinion with the plaintiff on both points, then the *possea* to be delivered to him; otherwise the *possea* to be delivered to the defendants, and the verdict to be entered for them, damages 1s. and costs according to the statutes.

After two arguments at the bar, the first on the 18th of November 1754 by *Prime* King's Serjt. for the plaintiff, and *Draper* Serjt. for the defendants, and the second on the 1st and 3d of February 1755 by *Wynne* Serjt. for the former, and *Willes* King's Serjt. for the latter, the Court took time to consider of their opinion; and now it was delivered, as follows, by

Willes Ch. J. (after stating the case and the questions reserved). "If the Court are of opinion with the defendants on either of the questions, the plaintiff cannot recover; so that we need not of necessity give our opinions on both questions if we are of opinion with the defendants on either of them: but as both are submitted to the Court, and as the first question is of public concern and is that which was principally intended to be considered, we think it best to give our opinions on that also, though on the second question we are of opinion with the defendants.

The first question depends on the several acts of parliament alluded to. By stat. 2 & 3 Ph. & M. c. 8. s. 2. every person

1755.

 PEARSON
against
 ROBERTS.

son for every plough land which he shall occupy in a parish, and every other person there keeping a draught or plough, shall find and send at every day [4 days] and place to be appointed for amending the ways in that parish *one wain or cart* furnished after the custom of the country with oxen horses or other cattle, and all other necessities meet to carry things convenient for that purpose, and also two able men with the same; under pain of every draught making default *10s.* The stat. 5 *Eliz. c. 13.* makes no alteration; it only appoints six days instead of four. By stat. 18 *Eliz. c. 10. s. 4* every person occupying and keeping in his hands in possession several or divers plough lands in several or divers towns shall find in each town or parish (where the plough lands in his occupying do lie) one cart or wain furnished &c. for the amendment and repairing of the highways within the several parishes where the said plough lands lie, as if he were a parishioner dwelling within the parishes where the said plough lands do lie. The stat. 22 *Car. 2. c. 12.* makes no alteration in respect to this point; nor does that of 7 & 8 *W. 3. c. 29*; only the fifth section says that any person, who shall have in his occupation wood land or other land to the value of 50*l.* a-year, shall be deemed to have a plough land as to all the statutes concerning the highways. But the words of the statute of *Philip & Mary* are plain and clear, that no person shall send more than *one wain or cart*. But some books and cases were cited to shew that this had been long ago determined otherwise; and that the same construction had been put by the Court of King's Bench on the statute of *Philip and Mary* as was put on it by the *Bedfordshire* Justices. But when they are examined, they will be found to be of no weight. The case of *Rex v. The Inhabitants of Fulham, M. 27 Car. 2. B. R.* reported in 3 *Keb. 567*, and referred to by *Dalton, c. 50.* was chiefly relied on: but when looked into, it appears to be no authority at all. My Brother *Draper* was pleased to furnish us with copies of the orders that were made in the King's Bench in respect to this matter. And yet the mistake of this case is the only foundation of *Dalton's* opinion. Possibly upon this motion some expressions may have fallen from some of the Judges in favor of this notion: but if they did, such extrajudicial sayings concerning a matter not properly before them can be but of very little weight especially

especially when the words of an act of parliament are so plain and clear as they are in the present case. The case in *Sir T. Raym.* 186, is no determination at all, and only what was said on a fine set by Justice *Morton*, who to be sure had no authority at all to do what he did; and therefore the Court set it aside. Besides, the report of that case is very dark and obscure. Therefore, as to the first point, we are of opinion with the plaintiff (a).

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But we think that the second point is against him; for the words of the stat. 24 G. 2. c. 44. s. 6. are so very plain and extensive that it is impossible to get over them. The words are *no action* shall be brought against any officer or any person for any thing in obedience to any warrant under the hand and seal of a justice of peace until a demand in writing hath been made of the perusal and copy of such warrant; which is admitted not to have been done here.

The answer that was attempted to be given to it was that a *replevin* is not an *action*: but it is certainly as much an action as any other whatsoever. It proceeds by writ declaration and plea or avowry in the same manner as other actions: the person who brings it is called a plaintiff, and the person against whom it is brought is called a defendant or avowant, according to the nature of his defence; costs are given to the plaintiff and defendant or avowant in the same manner as in other actions; it is considered as an action in the statute 4 & 5 An. c. 16; and in most of the statutes concerning replevins, particularly in 7 Hen. 8. c. 4; and 17 Car. 2. c. 17. it is expressly called an action or suit.

But to shew that it was not intended to be within this clause of this statute, an argument was drawn from the first section of the act, where the words are as general in respect to *actions* brought against justices of the peace, and that directs that at least a month before any action commenced no-

(a) But an alteration has been since made in this respect by the general highway act, 13 Geo. 3. c. 78. s. 34; by which the occupier of lands &c. is liable to provide one waggon, cart, &c. furnished after the custom of the country with horses &c. and two able men, for every 50l. a-year occupied by him &c.

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PEARSON
JURIST
RESTATE.

tice in writing shall be given to the justices. It was argued that the word "action" must be taken in the same sense in both these clauses, and that this could never be intended to extend to replevins, for if it did it would entirely take away the benefit of replevins in these cases, because before the month after the distress the goods taken might be sold or spoiled, and so the party would be without remedy. But this argument arises from a mistake, in not considering the nature of replevins, and that there are two sorts of replevins; one only to have the goods again, which may be by plaint in the Sheriff's Court, or a mandatory writ to the sheriff; and another by way of action in order to recover damages. Now the first sort of replevin is certainly not an action, and to that to be sure the statute does not extend. But the second, which is the present case, as I have already shewn, is plainly an action; and this we are all of opinion is clearly within the words of this act (*a*); and that therefore the plaintiff, not having demanded a perusal and copy of the warrant before the action commenced, can have no judgment in this action.

Another point was started that a replevin will not lie in the present case, the distress being in the nature of an execution (*b*). But

^a See *Atwood v. Coffin*, 2 B. Rep. 1331. But see also Lord Kenyon's observation upon it in *Harper v. Carr*, 7 D. & E. 274.

^b On authority as well as principle, it seems as if the goods taken in this case could not be replevied. Lord Chief Baron Gilbert indeed (*Gibb Replevin*, 155) says "if a superior jurisdiction award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of the execution; and if any person should pretend to take out a replevin, the Court of Justice would commit him for a contempt of their jurisdiction. But if any inferior jurisdiction award an execution, a replevin will lie for the goods taken by that execution, because, the inferior jurisdiction being restrained within particular limits, the officer who took the goods is obliged to shew that he took the goods within those limits, and that the inferior court which issued the execution did not exceed their authority in issuing it; besides an inferior court of record cannot commit for contempt out of the court." But with great deference to so high an authority as Lord Chief B. Gilbert, the two reasons given for the latter position by no means warrant it. His first reason fails, if the officer took the goods within the limits of the particular jurisdiction, and if the inferior court did not exceed their authority in issuing the execution; in short if it be a legal execution regularly executed. And, with regard to the second reason, it does not follow, because an inferior court cannot commit for a contempt out of court, that therefore a replevin will lie; the want of authority to inflict one particular (and that an extraordinary) punishment for doing the thing does not prove that the thing itself may be legally done.—The only authority

But this is not one of the questions reserved, and besides is not now at all material. If we had been of opinion with the plaintiff on both the points reserved, it might have become material: but as we are not, I shall say nothing upon this point, for I do not like to moot points that are not before us and are no ways material.

But being of opinion for the defendant on the second question, the *postea* according to the rule must be delivered to him, and a verdict is to be entered for him with 1s. damages and costs."

authority cited by *Gilbert* in support of this opinion is the case of *Aylebury v. Harvey*, 3. *Lev.* 204; of which it is sufficient to observe, 1st, that this question was neither agitated at the bar or decided by the bench, and 2dly, that the judgment of the Court was against the plaintiff in replevin. But in opposition to this opinion may be placed *Bradshaw's* case, *T. 12 W. 3. C. B.*, 6 *Bac. Abr.* 55. oct. ed.; *R. v. The Sheriff of Leicestershire*, 1 *Barnard B. R.* 110; *R. v. Monkhouse*, 2 *Str.* 1184, and *R. v. Burchett*, *ib. est. 1.*; in which it was decided that where an act of parliament orders a distress and sale of goods it is in the nature of an execution, and a replevin does not lie; and in two of which cases an attachment was granted, in the one against the sheriff, and in the other against the party, for replevying; and in *R. v. Burchett*, from a MS. note, it is said "The ground of the decision was that the conviction was conclusive, and its legality could not be questioned in a replevin."—In *Milward v. Coffin* indeed (2 *Blac. Rep.* 1330.) goods taken under a warrant of distress for nonpayment of a poor-rate were replevied, and the plaintiff in replevin succeeded: but there the special jurisdiction, which was given to the justices of the peace by the statutes 43 *Eliz. c. 2.* and 17 *Geo. 2. c. 38.*, was exceeded; and the goods were not, in contemplation of law, taken under an execution. And in a late case, *Fritchard v. Stephens*, 6 *D. & E.* 522., where goods taken under a warrant of distress granted by commissioners of sewers were replevied, and the proceedings in replevin removed into the King's Bench, that Court refused to quash the proceedings on a summary application, leaving it to the defendant in replevin to put his objection in a formal manner on the record.

DOE on the Demise of MILBURN and ANN his
Wife against D. SALKELD and Three Others.

T. 28 & 29
Geo. 2.

ON the trial of this ejectment before Mr. Baron Legge at Newcastle-upon-Tyne, a special case was reserved, in substance as follows.

A., in consideration of an intended marriage with B., gave granted and conveyed certain lands to B. and C. and their assigns, to hold to the use of B. and her assigns for life in bar of dower, and then to the use of the heirs of the body of B. by A., remainder over; and covenanted that the premises should remain and continue to the uses and intents aforesaid: Held that this deed operated as a covenant to stand seised; and that an only child of the marriage was entitled, after the deaths of A. and B.

X x

The

1755. The lessors of the plaintiff claimed under a deed of settlement, dated the 22d of June 1725, and made between Dordem. G. Simpson of the first part, Ann Storey daughter of J. Storey MILBURN of the second part, and W. Storey of the third part; by against which G. Simpson, in consideration of a marriage then SALXELD. intended to be had between him and A. Storey, and for a competent jointure for A. Storey and for a maintenance and provision for her during her life if she should survive G. Simpson, and for divers other good causes and considerations, gave granted released enfeoffed conveyed and confirmed to Ann Storey and W. Storey and their assigns the premises in question then in his possession, to hold to the use and behoof of the said Ann Storey and her assigns for life for and in full recompence and satisfaction of the dower which she by reason of the said marriage might claim, and after the decease of both the said George and Ann then to the heirs of the body of the said Ann lawfully begotten by the said George, and for default of such issue then to the use of the right (a) of the said G. Simpson for ever. In the deed were contained covenants by Simpson that he was seised in fee of the premises in question, that he had a right to convey them to the said A. Storey and W. Storey their heirs and assigns in manner aforesaid according to the true intent and meaning thereof; that the said premises should remain and continue unto the uses intents and purposes aforesaid and according to the true intent and meaning thereof discharged of and from all manner of incumbrances; and that he (G. Simpson) and his heirs &c. would from time to time do and execute all such further acts and assurances for the better assuring and conveying of the said premises to the uses intents and purposes aforesaid as W. Storey his heirs or assigns should require. The marriage took effect; and G. Simpson and Ann his wife are both dead, leaving an only child Ann one of the lessors of the plaintiff and the wife of the other lessor, Milburn. About five years after executing the above deed G. Simpson became a bankrupt; and his assignees by lease and release dated the 26th and 27th of May 1731 for a valuable consideration conveyed the premises in question to J. Wainhouse, under whom the defendants claim.

After two arguments at the bar the first time on the 26th of June 1754 by Poole Serjt. for the plaintiff and Prime

(a) So in the original instrument, which was full of blunders.

King's

King's Serjt. for the defendants, and again, on the 6th of February 1755 by Wynne Serjt. for the plaintiff, and Willes Serjt. for the defendants, *The Court* took time to consider of their opinion which was now delivered, as follows, by

1755.
Dox dem.
MILBURN,
against
SALKELD

Willes Lord Ch. J. (after stating the special case).

" This deed of the 22d of June 1725 cannot be considered as a bargain and sale, because there was no money consideration. And as there was no lease to make this deed good as a release, no livery to make it good as a feoffment, and as the deed could operate as a deed of confirmation because the grantees were neither of them in possession, the only question is whether it shall operate as a covenant to stand seised.

As most of the cases that have been determined on this head depend on the particular wording of the deeds, which have been construed as covenants to stand seised, and there are scarcely any two of them that are exactly like one another, I shall not mis-spense your time in going through all the cases that have been cited or might be cited on this occasion, but shall only mention some general rules on which all these cases are founded, and shall then take notice of some few cases that most resemble the present, and which are determined on the same reasons on which we shall determine this, and likewise two cases which are the only one of any weight that were insisted on as authorities against the opinion which I am going to give.

First, I shall mention what is said by Lord Coke in his comment on the statute of uses, in 2 *Inst.* 672, and in his 7 *Rep.* 40. *Bedell's* case, the intention of the parties is the principal foundation of the creation of uses; for verba intentioni, et non è contrà, debent inservire. *Hobart*, p. 277. says, I do exceedingly commend Judges that are curious and almost subtle, astuti, (a word used in the proverbs of *Solomon* in a good sense when it is to a good end,) to invent reasons and means to make acts operate according to the just intent of the parties, and to avoid wrong and injury which might be occasioned by rigid rules and

1755. adhering too strictly to the words themselves. This advice of Lord *Hobart* has been taken notice of by the Judges, and referred to in many of the cases of covenants to stand seised, as an excellent rule to go by, and I think we cannot observe any better. Mr. *Shepherd*, or whoever was the author of that book, says in the *Touchstone of Common Assurances*, p. 87. (and for what he says he quotes very great authorities) that too much regard ought not to be had to the native and proper significations of words and sentences to prevent the plain intention of the parties. For that the construction ought to be such as that the whole deed and every part of it may take effect as far as possible to the purpose for which it was made; so that when the deed cannot take effect according to the latter it may take some effect or other; for *benignè faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat; et quælibet concessio fortissimè contra donatorem interpretanda est.* In the case of *Sleigh v. Metham*, 1 *Lutw.* 782. the Court, in giving their judgment, laid down a great many good rules of the same sort as these which I have mentioned, and very applicable to the present case: but they are too long to repeat, and therefore I shall only mention one paragraph, and refer to the rest; “The words (says the book) of a deed ought to be so moulded, and such construction put upon them, that the intent of the parties may take effect, if possible. The words *covenant to stand seised to uses* are not of necessity to create uses, but words tantamount are sufficient, and there is no conveyance that admits such a variety of words as that of a covenant to stand seised.”

Having laid down some general rules and reasons by which we have governed ourselves in the determination of the present case, I shall only mention three or four cases that most resemble the present, and that are authorities for the plaintiff in the present case.

1. *Bedell's case*, 7 *Co.* 40. There *R. Bedell* by indenture between himself and his wife of the first part, *James* his second son of the second part, and *Michael* his third son of the third part, in consideration of natural love to *James* and *Michael* his sons, and for their preferments and advancement,

vancement, covenanted to stand seized to the use of himself for life, and after his decease to the use of his wife for life, and after their deceases to the use of *James* in tail as to one moiety and to the use of *Michael* in tail as to the other moiety: it was objected that no use arose to the wife, because she was not within the considerations expressed in the deed, and no other consideration could be averred: but it was answered and resolved by the Court, 1st, that a consideration, which stands with the deed, and is not repugnant to it, might be well averred (a); and 2ndly, that if no other consideration could be averred, there was an express consideration in that deed, for when the grantor limited it to the use of his wife for life, that imported a sufficient consideration in itself.

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Doe dem.
MILBURN
against
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2. The next is the case of *Croffing v. Scudamore*, reported in 1 *Ventr.* 137; 1 *Mod.* 175; and 2 *Lev.* 9; *A.* seized in fee bargained sold and entailed to his daughter *Jane* and her heirs certain lands in consideration of natural love and affection as an augmentation of her portion and preferment of her in marriage; and there was a covenant for her quiet enjoyment; the deed was enrolled within six months; but it could not operate as a bargain and sale for want of a money consideration, nor as a feoffment, because there was no livery; but it was adjudged in the Court of King's Bench, and afterwards that judgment was affirmed in the Exchequer Chamber, that it should operate as a covenant to stand seized. It is said in the case, as reported in 1 *Mod.*, contrary to what is said both in *Ventris* and *Levinz*, that the words "in consideration of natural love and affection" were not in the deed, and the grantor only called her his daughter; but whether these words were in the deed or not is not material, upon the authority of *Bedell's* case and several other cases; and many former cases were cited in this case in support of this opinion.

3. *Walker v. Hall* in *Scacc. M.* 29 *Car.* 2. reported in 2 *Lev.* 213. *A.* in consideration of marriage granted and confirmed to *Margaret* his intended wife certain lands to hold to her and her heirs, with a letter of attorney in the deed to make livery, &c. with a blank for the name in

(a) *Filmer v. Gott*; in Dom. Proc. 7 *Bro. Parl. Cas.* 70; and *R. v. The inhabitants of Scammenden*, 3 D & E 474 S. P.

the

1755. the letter of attorney: it was indorsed that livery was given, with a blank left for the name, and there were no witnesses of the livery: it was there holden that it could not amount to a feoffment, but that it was a good covenant to stand seized.

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4. *Osman v. Sheafe*, M. 5 W. & M. in B. C. in 3 Lev. 370; and reported by the name of *Osmere v. Sheafe* in Carth. 307. *M. Waller* for the affection which she bore to her cousin Sir *W. Brodman* gave and granted to him and his heirs a rent of 14*l.* a-year to hold to him and his heirs after her decease if she died without a son: there was no attornment, so it could not operate as a grant, but held that it should be good as a covenant to stand seized; for the Court said that it appears by the cases there cited that the Judges of late times have had more consideration to the substance, viz. *the passing of the estate*, than the shadow, to wit, *the manner of passing it*.

The case of *Goodtitle v. Petto* (a) is not material to the present case. There *Angelo Burt*, being seized in fee, in consideration of the love and affection which he bore to *Anne* his wife and for her issue covenanted to stand seized to the use of himself and his wife for their lives and the life of the survivor, remainder to the issue of their two bodies, remainder to the use of such person as his wife should think fit to dispose to, and for want of such disposition to the use of the lessor of the plaintiff: after the death of *Angelo* without issue, the wife conveyed the premises to her sister and her heirs, reciting her power, and she by her will gave the premises to the defendant: the lessor of the plaintiff was nephew to *Angelo*—it was adjudged, 1st, That as the express consideration was only for the support of the wife the appointment was not to be for her benefit, but she had only a naked power for the benefit of strangers, they could not claim under such a consideration; and they cited *Thomlinson v. Dighton*, Salk. 229; 2dly, That the defendant, being nephew to *Angelo*, had a good title; for though he was not so mentioned in the deed, he might aver himself to be so, according to 1 Co. 176; 7 Co. 40; & 11 Co. 24.

(a) 2 Str. 934.

The only case that was greatly insisted on as an authority against the plaintiff in the present case was that of *Samon v. Jones*, 2 *W. & M. 2 Ventr.* 318. on a special verdict. *W. Lewis*, in consideration of natural love and affection which he had for his wife and his son *Robert*, gave granted and confirmed unto *Robert* his son and his heirs his reversion in certain lands to the use of himself for life, then to the use of his wife for life, and after to the use of *Robert* and the heirs of his body, then to *Ellen* his daughter and the heirs of her body: *Ellen* was in possession and claimed under this deed; there was no enrolment or attornment, so the deed could not operate unless it operated as a covenant to stand seized; it was holden in the Exchequer that it should, but that judgment was reversed in the Exchequer chamber by the opinion of Lord Chief J. *Holt* and Ch. J. *Pollexfen*, and their judgment was afterwards affirmed in the House of Lords. They founded their opinion on the case of *Hore v. Dix*, *H. 12 Car. 2.* in *B. R.*, reported in 1 *Sid.* 25: but there the grant was to two strangers, and it was holden that it could not operate at all as to them, because of the consideration—and even if it had been a money consideration, it would not do, because if it operated as a bargain and sale there must be an use on an use, which could not be. And the same reasons are given in the case of *Samon v. Jones*. But I own I am not convinced by either of these authorities, and think that the opinion of the Court of Exchequer was right; for, though in *Hore v. Dix* the grant was to a stranger, the grant in *Samon v. Jones* was not to a stranger; however as this is a great authority, if we could not distinguish it from the present case, we must be bound by it; but it is plainly distinguishable. For this is a grant in consideration of marriage and in bar of dower to the intended wife and the issue of that marriage; the intention of the parties is clear and manifest: the consideration is expressed in the deed, though it need not have been; the conveyance is not to a stranger; and there is a covenant that the grantees should hold and enjoy, which likens it to the case of *Sleigh v. Metham* in *Lutwych*.

So that the plaintiff is entitled to judgment, and the possession must be delivered to him (a).

(a) Vid. *Rec d. Wilkinfen v. Tranmar*, *post*, 682.

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Dox dem.
MILBURN
against
SALKELD.

1757.

CHEESEMAN AGAINST HOBY.

M. 31 G. 2

Friday,

Nov. 13th.

Where the

right to

tithes is ad-

mitted, and

a question

arises be-

tween the

rector and

vicar as to

whether they

are payable,

that questi-

on is tri-

able in the

Spiritual

Court: and

conclu-

sionally the

Common

Law Courts

will not

grant a

prohibition.

THE opinion of the Court was delivered, as follows, by


W^{ill}es Lord Chief J. " A prohibition has been moved (2) for to the Consistory Court of the bishop of *Lincoln*. *Hoby* the lessee of the impropriators (the Dean and Chapter of *Lincoln*) had sued *Cheeseman* in that Court, who was an occupier of lands in *Burringham* in the parish of *Netherford* for tithes of flax and hemp. *Cheeseman* by his plea there insisted that the tithes were small tithes, and that these tithes or an uncertain composition have been time out of mind paid to the vicar; and he insisted likewise in his plea on an endowment of the vicar in 1310, and on an agreement in 1691 between the vicar and the parishioners.

So the question to be tried in the Spiritual Court is not on a *modus* (for it is admitted that tithes in kind are due,) but whether the tithes are to be paid to the vicar or the impropriator.

A great many cases were cited, and very properly: but I shall only take notice of a few of them; because there are so many jarring cases on the head of prohibitions that it is very difficult to reconcile them. For when the power of the church ran very high, the Judges were cautious in granting prohibitions; when it did not run so high, the Judges ventured to go further in granting them.

I admit that this Suit is to be considered as between ecclesiastical persons: for *Cheeseman* insists on the right of the vicar, and *Hoby* claims under the right of the Dean and Chapter, who must be considered as ecclesiastics when they insist on an ecclesiastical right. But the rule that has been laid down, that when both parties are ecclesiastics courts of law ought not to grant a prohibition,

This case was argued on the Wednesday preceding by *Martin Serjt.* against the rule for the prohibition and by *Harmer: Serjt.* in support of it.

I do not at all rely on, because I think it a very absurd one and without the least colour of reason. For though one of the parties be a layman, if he do not insist on a modus or some other matter properly triable at common law, the court christian must determine the matter, and a prohibition will not be granted: on the other hand, though both parties be ecclesiastics, if either of them insist on a deed or any other matter properly triable at common law, a prohibition will certainly lie. What is said by Lord Coke and Hobart and in several other books, that where a custom is insisted on contrary to common right a prohibition ought to go, does not at all affect the present case; because here the common right, which is the payment of tithes, is admitted, and the question is only to whom they are payable. 1757.  CHEESEMAN
 against Ho-
 BY.

But we found our opinions on the judgment in the case of *Drake v. Taylor*, 1 Str. 87, and the reason which is given for it at the latter end of the case; for those given in the first part I think very weak ones. The case there is the same as this; for it is between a vicar and an occupier of lands who insisted on the right of a lay impropriator and that the tithes claimed have time out of mind been paid to him. A prohibition was denied by the Court (a); and the reason assigned at the latter end of the case is, that the custom there insisted on relating to a spiritual matter and not any temporal right, or in bar of any ecclesiastical right, ought to be tried in the Spiritual Court, because 50 years make a custom by the ecclesiastical law; and therefore if the courts of law were to judge of such a custom, they would judge by a wrong rule. And for this reason we refuse a prohibition in the present case.

If *Cheefeman* had insisted on a modus payable time out of mind to the vicar, a prohibition ought to go, because the Spiritual Court could not try the modus. But as the right to tithes is admitted, and the only question is whether they are to be paid to the vicar or the rector, we are of opinion that the point in question is proper to be

(a) In that case a prohibition had been before denied by the Courts of Exchequer and the Common Pleas.

1757. tried in the Spiritual Court. The endowment in 1310, and the memorandum in 1691 in respect to the present motion, are quite out of the case.

MAF
against Ho-
BY.

For these reasons we are all of opinion that the rule for a prohibition ought to be discharged."

ROE on the Demise of WILKINSON *against* TRAN-
MARR and Others.

R. 31 G. 2.
Fridy.
Feb. 3.

A Special case was reserved on the trial of this ejectment at the assizes at York. By deeds of lease and release, dated the 9th and 10th of November 1733, Thomas Kirkby in consideration of natural love to his brother Christopher Kirkby and of 100*l.* granted released and confirmed to Christopher Kirkby the premises in question, after the death of Thomas Kirkby, to hold to the said C. Kirkby and the heirs of his body, and after their decease to John Wilkinson (the lessor of the plaintiff) eldest son of his (the grantor's) well beloved uncle John Wilkinson, and his heirs and assigns, and to the only proper use of the said J. Wilkinson the younger "his executors administrators or assigns for ever," he the said J. Wilkinson the younger paying to the child or children of his (the grantor's) brother Stephen Kirkby 200*l.* [and for want of such children to other nephews and nieces therein mentioned ;] and for want of such children, the estate was to be free from the payment of the sum of 200*l.* The release contained covenants from the grantor that he was seised in fee of the premises in question : and that it should be lawful for Christopher Kirkby or J. Wilkinson the younger, after his (the grantor's) death peaceably and quietly to hold &c. And it was thereby covenanted granted and agreed by and between the said parties that all fines recoveries and other assurances of the said premises already levied suffered and executed by and between the said parties should enure to and for the only use and behoof of Christopher Kirkby and the heirs of his body, and for want of such issue to the proper use and behoof of John Wilkinson the younger his heirs and assigns for ever, according to the true intent and meaning of those presents. As the

the deed — H. M. that the deed could not operate as a release, because it attempted to convey a freehold in futuro, but that it was good as a covenant to stand seised, 2 Will. 3. S. C.

time of executing the deeds *Christopher Kirkby* paid 20l. 1758.
 part of the consideration in money, and gave his note for
 the remainder : and a receipt was signed by *T. Kirkby* for
 the whole sum. *T. Kirkby* continued seised of the pre-
 mises in question until his death in 1744. *Christopher*
Wilkinson died in the year 1740 without issue. *J. Wilkin-*
son, the lessor of the plaintiff, had no notice of the deeds
 of lease and release until a short time before the ejectment
 was brought.

ROX. dem.
 WILKIN-
 SON
 against
 TRAN-
 MERE.

The case was argued on the 9th of *February* 1756 by
Willes Serjt. for the plaintiff, and *Poole* Serjt. for the de-
 fendant ; a second time on the 25th of *June* 1756 by
Hewitt Serjt. for the former and *Prime* Serjt. for the lat-
 ter : and again a third time on the 23d of *June* 1757 by
Hewitt Serjt. and *Prime* Serjt. And

Willes Lord Chief Just. now delivered the opinion of
 the Court, as follows, first stating the case :

“ It is admitted that this deed will not operate as a re-
 lease, because it grants a freehold in futuro, which can-
 not be done. The only question therefore is whether, in
 respect to *John Wilkinson* the lessor of the plaintiff, it can
 operate as a covenant to stand seised ? If it can, he ought
 to recover in this suit ; if it cannot, judgment must be
 for the defendants.

A great many cases were cited in the argument of this
 cause, and to be sure there are a great number of cases not
 quite consistent with one another upon this question,
 what shall amount to a covenant to stand seised. But as I
 think that this case rather depends upon the general rea-
 son of the law and some particular rules that have been
 laid down in respect to covenants to stand seised, I shall
 not go through all the cases that have been cited, but shall
 only mention some few of them as authorities in point
 for the opinion which I am going to give, and two or
 three that were cited on the other side, to shew that the
 judgment which we are going to give does not clash with
 any of them.

And

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 WILKIN-
 SON
 agent
 TRANS-
 MARR.

And we are all of opinion (for my Brother *Bathurst*, though absent, has given me leave to say that he is of the same opinion with us) that this deed of release may operate as a covenant to stand seised.

And first we found our opinion on the general rules of law in respect to the exposition of deeds, which are laid down in many of the books, and which are collected out of them by *Shepherd on Common Assurances*, p. 82 & 83; in which he says that *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat, and that verba intentioni, et non è contrà, debent inferri*. And therefore (he says) that deeds which are intended and made to operate one way may operate another way, if the intention of the parties cannot take place, unless they operate a different way from what they were intended: and he puts these instances (amongst others) that a deed intended for a release, if it cannot operate as such, may amount to a grant of a reversion, an attornment, or a surrender, and so è converso. And that if a man make a feoffment in fee with a letter of attorney to give livery, and no livery is given, but there is in the same deed a covenant to stand seised to the uses of the feoffment, if this be in such a case where there is a consideration sufficient to raise the uses of the covenant, it will amount to a covenant to stand seised. In the case of *Cherry v. Scudamore* (a) which I shall mention more particularly by and by. Lord Ch. J. *Hale* cites the opinion of Lord *Staword* in fo. 277. and declares himself to be of the same opinion, that the Judges ought to be curious and diligent (Lord *Staword* used the word *attenti*) to invent reasons and means to make acts effectual according to the just intent of the parties. And it is said in the case of *Osman v. Shaw* (b) which I shall have occasion likewise to mention again presently, that the Judges in these later times and in this very right way have gone farther than formerly, and have had more consideration for the substance of the thing than the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it. These are the general reasons that we go on, and we think that all the former rules that have been laid down in respect

(a) 1 Salk. 380. 12 Mod. 645. 12 W. 3. 100.

(b) 1 Salk. 380. 12 Mod. 645. 12 W. 3. 100.

respect to covenants to stand seised all concur in the present case. I know of no others but these,

1st, That there must be a deed.

2d, That there be words sufficient to make a covenant.

3d, That the grantor or covenantor must be actually seised at the time of the grant.

4th, That the intent of the grantor must be plain.

5th, That there be a proper consideration to raise the use.

First; This is certainly a deed; and though it cannot operate as a release, it being signed sealed and delivered by the party does not cease to be a deed.

Secondly; That there are sufficient words to make a covenant I shall shew more particularly by and by: but if there were no other word but the word *grant*, that would be sufficient according to all the cases.

Thirdly; It is admitted, and so stated in the case, that the grantor *Thomas Kirkby* was actually seised at the time of the grant.

Fourthly; Nothing can be more plain than that the grantor intended that the lessor of the plaintiff should have the estate after the death of *Christopher Kirkby* without issue; it is said so in express words in three places in the deed; what estate he was to take is not material at present, he being still living.

Fifthly; Here is a plain consideration as to *Wilkinson* the lessor of the plaintiff; he is called in the deed eldest son of his well-beloved uncle *John Wilkinson*. If it were not so said in the deed, his relation to the grantor might be averred and proved, according the case of *Goodtitle v. Petto*, 2 Str. 935, and several cases that are there (a) cited out of Lord *Coke's* reports.

Having mentioned the general reasons and likewise the particular rules on which we found our opinion, I shall now mention some few cases which I think are authorities in point. I shall not take notice of the ancient cases, because of late the courts of law have gone much farther in the determination of this question, and likewise because there are several rules laid down in these ancient

(a) And *Filmer v. Gutt*, 7. Bro. Parl. Cas. 70; & *R. v. The Inhabitants of Scammenden*, 3 D. & E. 474.

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ROX dem.
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MARR.

1758. *ROX dem. WILKINSON against TRANMARR.* cases which are not now adhered to. But I shall begin with the case of *Crossing v. Scudamore*; *Tr.* 23 *Car.* 2. in *B. R.*; & *P.* 26 *Car.* 2. in *Cam. Scacc.*; reported in 1 *Mod.* 175; 2 *Lev.* 9. & 1 *Ventr.* 137; *Coultsman v. Senhouse*, *E.* 30 *Car.* 2. *B. R.*; *Sir T. Jon.* 105; *Walker v. Hall*, 29 *Car.* 2. in *Scacc.* 2 *Lev.* 213; *Harrison v. Austin*, *Tr.* 3. *J.* 2. *B. R. Carth.* 38, 9; *Baker v. Lade*, *B. C. H.* 2 *W. & M.* 3 *Lev.* 291; & *Osman v. Sheafe*, 3 *Lev.* 370; 5 *W. & M. B. C.* [His Lordship here stated and commented (a) upon these cases.] These are all the authorities that I shall mention for the opinion that I am going to give, and I think that these are sufficient.

But before I give the judgment of the Court, I shall take notice of some objections that were made on the part of the defendants, and two or three cases that were cited to support them.

1st, It was objected that the lessor was no party to the deed. But, to be sure, this is no objection. It is not necessary that a person taking under a deed should be a party; remainders are most commonly limited to persons who are not parties, and especially in covenants to stand seised.

2dly, That there was no consideration as to *Wilkinson*: But this I have answered already.

3dly, That it was intended to be a deed at common law, and therefore cannot operate by the statute of uses. This is founded on the dictum in *Co. Lit.* 49. "Where a man hath two ways to pass lands, and both be by the common law, and he intendeth to pass them by one of the ways, yet ut res magis valeat it shall pass by the other. But where a man may pass lands either by the common law or by raising of an use and settling it by the statute, there in many cases it is otherwise." But that rule has not been observed for above an 100 hundred years last past; and most of the cases cited are determined contrary to that rule. Nor does Lord *Coke* lay it down as a general rule, but he only says that it is so in many cases. And *Shepherd*, in his book of *Common Assurances* which I have already mentioned, who has verbatim transcribed the words of

(a) *Vid. Doe & Milburn & Saltfield, sup. 677.*

Lord *Coke*, puts a case, which I have already mentioned, directly contrary to this rule. 1785.

4thly, The next objection was that the deed was void, and cannot operate at all. If by this be meant void, as such a deed which it was intended to be, all the cases are against the objection. If it were meant a void deed, this, as I have already shewn, is not so, it having been duly executed by the grantor.

ROE dem.
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SON
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TRAN-
MARR.

5thly, But the main objection, and which the cases (of which I shall take notice) were cited to support, was that no estate passed by this deed to *Christopher Kirkby*, out of whose estate the other estates are to arise; and it is admitted that he can take no estate by this deed. To support this objection were cited, *Atwaters v. Birt*, 43 *Eliz. B. C. Cro. Eliz.* 856; *Hore v. Dix*, *H. 12 Car. 2. B. C. 1 Sid.* 25; and *Samon v. Jones*, 2 *Ventr.* 318. If this objection had not been so solemnly determined in these cases to be a good one, I own I should have been of another opinion; because in a covenant to stand seised the estate properly arises out of the estate of the grantor, and his intent that it should not (I think) signifies nothing. For though his intent is to be regarded *what estate* is to pass *and to whom*, I do not think it is all to be regarded *as to the manner* of passing it (of which he is supposed to be ignorant;) if it were, it would overturn almost all the cases. But I choose, rather than contradict such great authorities, to distinguish the present case from them, and I think it is plainly distinguishable. For in the present case the estate to *Wilkinson* could not be to arise out of the estate of *Christopher Kirkby*, 1st, Because he was intended only to have an estate for life, or at most an estate-tail, and 2dly, Because the lessor's estate is not to commence until after the estate granted to *Wilkinson*.

There is likewise one thing in the present case much stronger than in any of the cases that have been cited on the one side or the other; for here is not only the word *grant*, which has been often construed as a word of covenant, but likewise the grantor expressly covenants in two places in the deed that the estate shall go to *John Wilkinson* in such manner as he has granted it.

For these reasons we are all of opinion that this deed will amount to a covenant by the grantor to stand seised

right
to the
use of
John
Wilkinson,
and that
therefore
he ought
to have
the benefit
of the
verdict,
and may
enter up
judgment
upon it."

to the use of *John Wilkinson*, and that therefore he ought to have the benefit of the verdict, and may enter up judgment upon it."

TITLEY against FOXALL.

THIS came before the court on a demurrer to the defendant's plea of justification to an action for an assault, battery, and false imprisonment.

The defendant pleaded, as to the assaulting beating and imprisoning the plaintiff on &c. and detaining him in prison for 12 hours, that King *Charles the First* by letters patent dated the 10th of *June* in the 14th year of his reign incorporated the freemen and burgesses of *Shrewsbury* &c. and granted that the mayor aldermen and burgesses and their successors should from thenceforth have and hold within the town before the mayor and recorder, or either of them, a court of record upon *Tuesday* in every week throughout the year, and that they might hold by plain in the same court to be believed all and all manner of actions of *assault battery and false imprisonment* if *trepasses and pleas upon the case* arising within the town were to be heard and determined before the mayor and recorder of the said town or either of them, as by the said letters patent remaining upon record in the Court of Chancery may appear. That at the court of record held in and for the said town, within the jurisdiction of the said court, on *Tuesday* the 8th of *June* 1756, before *J. Rushmore Esq.* then mayor, the defendant came into the said court and levied his plaint there against the plaintiff in a plea of *trepass upon the case*; to the damage of the defendant of *20s.* for a certain cause of action arising within the jurisdiction of that court; and such proceedings were thereupon had in the same court upon the said plaint and returned at the said court &c. on *Tuesday* the 15th of *June* 1756 before the said mayor there issued out of the said court at the instance of the defendant in plea of the said plaint a certain writ of *capias*, directed to the three Sergeants at Mace of the said town returnable at the then next court &c. to be held on the 22nd of *June*, and indoried for bail 15^{l.} 3^{s.} 4^{d.} That the

the writ was delivered to *Robert Phillip* one of the persons named in the writ and an officer of the said court; by virtue whereof *Phillips* and the now defendant in aid of the said *Phillips* and by his command and as his assistant on the 19th of *June 1756* at *Shrewsbury* and within the jurisdiction of the said court, *genly laid their hands upon the plaintiff in order to arrest him* for the cause aforesaid; and then and there took and arrested the plaintiff by virtue of the said writ and detained him under that arrest for twelve hours for want of bail, &c., which is the same assaulting beating and imprisoning whereof the plaintiff complains, &c. And as to the residue of the trespass the defendant pleaded not guilty.

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To this plea the plaintiff demurred specially, because the defendant did not make any profert of the letters patent of *Car. 2.* set forth in the plea.

After argument (*a*) by *Poole*, Serjeant, in support of the demurrer, and by *Hewitt* Serjeant contra, the opinion of the Court (*b*) was delivered as follows by

Willes Ld. Ch. J. "Four objections have been made on the part of the plaintiff; the first, a matter of form only, and it is set forth as cause of demurrer; the other three of substance; and therefore, if good objections, they may betaken advantage of on the general demurrer.

1st. That in the plea there is no profert of the letters patent, by which the Court is erected.

2dly, That it is not stated in the plea what sort of action it was below, to shew that it was within the jurisdiction of the Court.

3dly. That a capias issued without any summons.

4thly. That an arrest is no justification to the battery.

To the first objection I have given an answer already (*a*)
The

(*a*) On Friday June 2d, 1758. (*b*) Abf. Clive J.

(*c*) This appears to have been answered in the course of the argument, by observing that the defendant did not claim any thing under the charter, and that he was a stranger to it, and therefore need not make a profert of it. *Bra. Abr. "Mansfrans de fait,"* pl. 125; 161. & 2 *Shew.* 418.—And in the *case*
Y. y

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The second and third objections were taken together, and were very strongly relied on. It was said that there were two authorities in point determined in this Court since I came into it; *Moravia v. Sloper*, and *Murphy v. Fitzgerald*: and it was said that no one would be able to advise his client if we should be of opinion in this case (as we seemed to be) contrary to the determinations in those two cases. But before Counsel say this, they should be sure that they understand the cases that they cite, and that they state them correctly to the Court; for when those two cases are rightly stated, it will be plain that though we should determine (as we shall do) for the defendant in the present case, we shall not decide contrary to those two cases. [Here his Lordship first read the report of *Moravia v. Sloper* from *Com. Rep.* 574, and then from his own manuscript, &c. to mark the difference between them.] Here it is averred that the Court below has a jurisdiction of all actions of trespass upon the case arising within the town, &c. it is sufficiently shewn in this plea that the cause of action arose within the jurisdiction; we held in *Moravia v. Sloper* that *taliter processum est* would be sufficient if it did not appear (as it did in that case) that there could not have been a precedent summons; and we founded our decision on the case of *Patrick and Johnson*, in 3 *Lev.* 403, and in several other cases there cited: It was said in this case that it was resolved by the whole Court that *taliter processum est* was sufficient, though it had been formerly held otherwise, and that it had been so resolved by the Court of *Exchequer* and the Court of *B. R. H.* 24 & 25 *Geo. 2.* But in the present case a week intervened between the Court when the plea was levied and that when the case was tried. The case of *Murphy v. Fitzgerald* was at the same time in every respect as that of *Moravia v. Sloper*, and so it was determined without argument.

No cases were cited to support the fourth objection, but *Farmer v. Fyfe* by 4 *Lev.* 403 *v. Carpenter* (2), and *Farmer v. Fyfe* by 4 *Lev.* 403 *v. Carpenter* (2).—The Court in *Farmer v. Fyfe* seemed to be of opinion against

Farmer v. Fyfe (2) 4 *Lev.* 403 *v. Carpenter* (2) 4 *Lev.* 403, where the Court held that a writ of *habeas corpus* would lie without a protest, no objection was made to the writ.

Farmer v. Fyfe (2) 4 *Lev.* 403 *v. Carpenter* (2) 4 *Lev.* 403 (2) 114
Farmer v. Fyfe (2) 4 *Lev.* 403 *v. Carpenter* (2) 4 *Lev.* 403

against this objection: for after it was argued and insisted on, the book says, "as to the last two objections, of which this was one, cur. adv. vult; and that the plaintiff being afterwards satisfied that these two objections would not help him, and that the Court would give judgment against him, discontinued his suit (a)." In the two other cases cited it was not pleaded *molliter manus imposuit*, as in the present case, but only an arrest, which may be two ways. If this doctrine were to prevail, all pleas of *molliter manus imposuit* would be bad, and hundreds of judgments must be set aside wherever a *molliter manus imposuit* would be a battery if not justified (a). I have looked into a great many precedents that are so, and no objection taken. I shall mention only two. In the case of *Murphy v. Fitzgerald* (c) the plea of justification was just the same as in the present case; and so likewise in the case of *Gwinne v. Poole* (d), and yet, though that was so much litigated, this objection was not taken."

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Per Curiam.

Judgment for the Defendant.

(a) But see the report of this case in *Lutw.* 929. (b) *Vid. Rowe v. Tattle*, *sup.* 14, and the cases there referred to. (c) *Sup.* 38 *n. a.* (d) 2 *Lutw.* 935.



AN

I N D E X

TO THE

PRINCIPAL MATTERS.

A

ABATEMENT,

See PLEADING.

1. **A** Defendant cannot plead in abatement after making a full defence *Alexander v. Macwan*, *M. 11 G. 2. C. B.* Page 40
2. But he must "defend the force and injury when" before he can plead in abatement to the disability of the person or the jurisdiction of the Court; for that is not a full defence. *ib.* 41
3. A defendant, who is sued as executor, cannot plead in abatement that a co-executor ought to have been sued with him, without shewing that the co-executor administered &c. *ib.* 42
4. Where the defendant, in pleading such a plea, said that "he and the other executor did administer divers goods &c. where the said A. B.'s (the testator's)" the Court rejected the word "where" as surplusage, and held the plea good. *ib.*

ACCOUNT.

1. One tenant in common cannot maintain an action of account at common law against another as his

- bailiff, unless that the other were appointed bailiff. *Wheeler v. Horne*, *T. 13 & 14 G. 2. C. B.*, 208.
2. But under the stat. 4 & 5 *An. c.* 16. he may. 208
 3. A bailiff at common law is answerable for what he might have received without his wilful default. *ib.* 210
 4. But a tenant in common, when sued as bailiff, is only answerable for what he has received. *ib.*
 5. In an action on the stat. 4 & 5 *An.* the plaintiff must state in his declaration that he and the defendant are tenants in common, and that the defendant has received more than his share.

ACTION,

See BYE-LAW, No. 6, 7.
 REPLEVIN, No. 2.
 WAY, No. 4.

1. Whether an action be real or personal depends on the thing to be recovered by it, and not on the nature of the defence. *Eaton v. Southby*, *H. 12 G. 2. C. B.* 134
2. And therefore a replevin is a personal action, though the title to land be brought in question. *ib.*
3. An action to recover a penalty on

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on *Stat. 5 & 6 Ed. 6. c. 14.* must be brought in the county where the fact was committed, and not commenced in the superior courts at *Windsor*. *Jeffery q. t. v. Cole,* *M. 21 G. 2. C. B.* 634

ACTION on the Case,

See PLEADING, No. 83, 84, 85.

1. In an action on the case by the owner of an ancient ferry against a person who erects a new ferry near to his, the plaintiff may declare in his possession. *Blythe v. Harp, M. 15 G. 2. C. B. Page 508*

2. So in an action on the case by a commoner against a stranger and wrongdoer. *Garrison v. Hley,* *K. 22 G. 2. C. B.* 621

3. But in an action against the lord, he must set forth his title. *ib.*

4. To support an action on the case there must be damage cum injuria. *Wainwright v. Grosvenor, M. 24 G. 2. C. B.* 577

5. In an action on the case for enticing away the plaintiff's wife it is sufficient to state that the defendant unlawfully and unjustly persuaded, procured and enticed the wife to quit her husband &c. by means of which persuasion she did quit her husband &c. whereby the plaintiff lost the comfort and society of his wife. without setting forth the means used by the defendant. *ib.*

6. An action on the case may be maintained for the tort of *seduction*. *ib.* *See also note above of mention in parliament, though there has been no determination of the point in *Commons* on the right of *seduction* for that point. *ib.**

Stanton v. Wynn Bart.; in error. Cam. Scacc. H. 19 G. 2. 601

ADMINISTRATION.

1. Administration may be granted within 14 days after the death of the intestate *Hall v. Moss, T. 16 & 17 Geo. 2. C. B.* 428, n. a.

ADMINISTRATOR,

See EXECUTOR.

AFFIRMATION.

1. The Court refused to receive the affirmation of a Quaker on a motion for an attachment for non-performance of an order of Court. *Skipp v. Harwood, M. 15 G. 2. C. B.* 291

2. The affirmation of a Quaker cannot be received when the object of the prosecution is criminal [referred to in note b.] *ib.* 292

3. Even though in form it be a civil proceeding. *ib.* 292

4. Except where the application is against a Quaker; there his own affirmation may be received. *ib.*

5. Where the object of the proceeding is of a civil nature, the affirmation of a Quaker may be received. *ib.*

6. Though the proceeding be in the name of the King. *ib.*

See DEFEAZANCE, No. 3.

AMENDMENT.

1. The statutes 16 & 17 Car. 2., and 4 & 5 An. c. 16., only extend to mistakes in the names of the plaintiff or defendant, not of third persons; and therefore where to debt on a replevin bond brought by the sheriff against a surety, the defendant pleaded that *A.* (the party replevying) prosecuted his suit &c.

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&c., and that no return of the goods was adjudged to *B.* (the party distraining); and the plaintiff replied that a return was adjudged to *B.*, yet the said *B.* did not make return &c. this on a general demurrer was holden to be a fatal defect. *Harvey v. Stokes, E. 10 G. 2. C. B.* Page 5

2. Inferior courts cannot amend errors in process under statutes 8 Hen. 6. c. 12 & 15. *Morse v. James, M. 12 G. C. B.* 125

3. Some of the statutes of amendment are confined to the superior courts, and some extend to all courts of record. *ib. n. d.*

4. The Court will amend a recovery wherever it can be done consistently with the rules of law. *Wynne v. Thomas, E. 18 G. 2. C. l.* 565

5. But they cannot amend the teste of a writ of entry, where it is not the misprision of the clerk and where there is nothing to amend by. *ib.* 567

AMERCEMENT,

See COURT, No. 3, 4.

ANNUITY,

See CONDITION, No. 1.

ARBITRATORS,

See AWARD.

ARREST.

1. A person may be arrested on a *Sunday* on an attachment for a refusal. *Anonymous, E. 17 G. 2. C. B.* 459

2. Or under an escape warrant. [Cite cited in *n. a.*] 460

3. Or even without a warrant, if he has wrongfully escaped. *ib.*

4. But bail cannot take a defendant on a *Sunday* in order to surrender him. *ib.*

5. Nor can a defendant be arrested on a *Sunday* for non-payment of a penalty under a conviction on a penal statute. Page 460

ASSAULT,

See PLEADING, No. 10.

ASSUMPSIT.

1. A general indebitatus assumpsit will lie for a duty in which the plaintiff claims an inheritance; *semb. The Mayor &c. of Nottingham v. Lambert, M. 12 G. 2. C. B.* 118

2. So ruled since in several cases. *ib. n. a.*

3. If *A.* be illegally arrested by *B.* for a debt, a promise by *C.* to pay the debt claimed by *B.*, in consideration of *B.*'s releasing *A.* out of custody, is void. *Atkinson v. Settree, E. 17 G. 2. C. B.* 482

4. So is a promise to pay in consideration of forbearing to sue on a void security. [Case referred to, *n. (1).*] *ib.* 484

5. Or a promise to revive a security void in it's creation. *ib.*

6. But if it be stated in a declaration against *C.* (on a promise by him to pay *B.* a debt claimed from *A.* in consideration of *B.*'s releasing *A.* from arrest) that *B.* procured *A.* to be arrested by virtue of a certain writ &c. duly issued out of an inferior court, it will be intended after verdict that the arrest was legal. 482

ATTACHMENT.

See ARREST, No. 1. AWARD, No. 11. INFERIOR COURT, No. 16.

1. An attachment granted against the prochein amy of an infant (plaintiff) for non-payment of costs after judgment for the defendant. *Slaughtier v. Talbott, M. 13 G. 2. C. B.* 190

2. *AN*

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2. An attachment for non-performance of an award is now considered only as a civil proceeding. [Cases referred to in n. b.] *Page* 292
3. The Court will not grant an attachment against an administrator for not performing a rule of Court entered into by the intestate. *Newton v. Walker, H. 15 G. 2. C. B.* 315
4. The Court refused to grant an attachment against a sheriff for not taking a replevin bond on his granting the replevin *Twells v. Colville, M. 16 G. 2. C. B.* 375
5. But they will grant an attachment against him for refusing to pay a year's rent to the landlord according to stat. 8 *An. c. 14.* when he has taken the goods of a tenant in execution. *ib.* 376
3. And if they award "the costs sustained in the action," it will not include the costs of the reference. *Page* 64
4. An award may be good in part and bad in part, provided the different matters in each be distinct and not dependent one on the other. *ib.* And *Storke v. De Smeth, 6 Hil. 11 G. 2. Com. Scacc.* 69 And *Johnson v. Wilson, Tr. 14 G. 2. C. B.* 253
5. And therefore if arbitrators award the costs of suit and the costs of reference, not having power to award the latter, the award will be good as to the former part and bad as to the latter. 64
6. If arbitrators award the defendant to pay the plaintiff his costs of suit to be taxed by the proper officer before a particular day, it is the business of the *defendant* to have them taxed before that day. 65
7. If the arbitrators award *A.* to pay *B.* 100*l.* and award *A.* and *B.* to give general releases to each other, and then award *B.* to pay *A.* 20*l.* at a subsequent time, the whole award is bad. *Storke v. De Smeth. 66*
8. So if the arbitrators award *A.* to pay *B.* 30*l.* on one day, and *B.* to pay 10*l.* on a subsequent day. *ib.*
9. When a cause is referred to three persons, with power to them or any two of them to make an award, an award made by two of them is good if the third had notice of the meetings &c. *Dalling v. Matchett, M. 14 G. 2. C. B.* 215
10. But if the third had no such notice, then such an award is bad. *ib.*
11. The Court refused to grant an attachment for non-payment of a sum of money awarded and which was

ATTORNEY.

1. A letter of attorney ceases to have effect on the death of the party giving it. *Shipman v. Thompson, T. 11. G. 2. C. B.* 105 And *Wynne v. Thomas, E. 18 G. 2. C. B.* 565
2. Every act done under a letter of attorney must be done in the name of the principal. 105
3. The statute 12 *G. 2. c. 13.*, which prohibits attornies in prison acting as attornies, only extends to attornies for *plaintiffs*. *Longmore v. Rogers, M. 15 G. 2.* 288. n. b.

AWARD.

1. Arbitrators cannot award the costs of reference, unless power is expressly given to them for that purpose. *Candler v. Fuller, H. 11 G. 2. C. B.* 64
2. But they may award the costs of the cause without such special power. *ib. n. a.*

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was demanded when a rule for setting aside the award was pending.

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12. Several tenants in common, wishing to make partition of their land, covenanted by deed to pay their respective share of the survey and allotments, and to abide by the award of certain arbitrators as to the allotments; the arbitrators allotted the whole in severalty, but did not direct any deeds of conveyance to be executed to vest the allotments in the respective owners; and for this defect it was ruled that the award was bad, and that no action could be maintained on the covenant for not performing the award, though the covenantors were respectively liable on the covenant for non-payment of the expense of the survey &c. *Johnson v. Wilson*, T. 14 & 15 G. 2. C. B. 248
13. When an award is void, a covenant to perform the award is also void. *ib.* 252
14. Under a submission to arbitration of all matters in difference between the parties, an award deciding all matters in difference, except one, and giving liberty to one of the parties to sue on that one, is void in toto. *Bradford v. Bryan*, Tr. 14 & 15 G. 2. C. B. 268
15. But an award, (made under such a reference) not in terms excepting any matter in difference, does not conclude one of the parties upon a cause of action subsisting at the time of the reference, if such matter were not laid before the arbitrator. [Cases referred to in note b.] 270

B

BAIL,

See ESTOPPEL, No. 3, 4.

BAIL-BOND,

See PLEADING, No. 76, 77.

BAILIFF,

See ACCOUNT, No. 1, 2, 3, 4.

BAILMENT.

1. If goods be delivered by *A.* to *B.* to keep safely, *B.* is answerable for them to *A.* in detinue though he be robbed of them. *Kettle v. Bromfall*, M. 12 G. 2. C. B. Page 121
2. Aliter, if they be delivered to *B.* to keep as his own goods &c. *ib.*
3. Though even in such a case he is answerable for damage arising from his own negligence. *ib. n. b.*

BANKRUPT.

1. If goods be consigned to a factor for sale, and he sell and receive the money before his bankruptcy and do not purchase with it any specific thing capable of being distinguished from the rest of his property, the consignors cannot recover the whole money from his assignees, but must come in under the commission. *Scott v. Surman*, H. 16 G. 2. C. B. 400
2. If the factor at the time of the sale agree to sett off a debt of his own due to the vendee; it is the same as if the factor received so much money from the vendee, and the consignors must come in under the commission. *ib.*
3. But if the goods remain in specie in the factor's hands at the time of his bankruptcy, the consignors may recover the goods in trover from the assignees. *ib.*

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4. Or if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had and received. *Page 400*
 5. So if the factor on such a sale take notes in payment from the vendee payable to him at a future day, and his assignees afterwards receive the money due on the notes, the principal may recover it from the assignees in an action for money had and received. *ib.*
 6. If the assignees of a factor (bankrupt) receive bounty money on any article under an act of parliament giving the bounty to the importer, the consignor of that article may recover such bounty money from them in an action for money had and received. *ib. 407*
 7. Where a debtor gives bail on an arrest, and afterwards surrenders himself in discharge of his bail, and then lies in prison two months, he becomes a bankrupt from the time of his going to prison, not from the time of his arrest. *Tribe v. Webber, E. 17 G. 2. C. B. 464*
 1. But where sham bail is put in before a Judge, as a mean to get the defendant turned over to the prison of the court, and he is immediately surrendered accordingly, the imprisonment is computed from the time of the arrest. [Case referred to, *n. e.*] *ib. 466*
 9. And in either of these cases the property of the bankrupt vests in the assignees by relation either from the arrest, or from the going to prison. *ib.*
 10. A separate commission of bankrupt may be taken out against one of several partners on the petition of a joint creditor. *Crispe v. Perriut, E. 17 G. 2. C. B. Page 467*
 21. In such case whether the bankrupt's share of the joint debt must amount to 100*l.*? *qu. ib. 474*
 12. But a commission of bankrupt cannot be sued out against two (of three) partners. [Case referred to *n. b.*] *ib.*
 13. A person, who buys and sells cattle, is a drover, and cannot be a bankrupt. *Mills v. Hughes M. 19 G. 2. C. B. 588*
- BARON AND FEME,**
See FINE, No. 1.
- BATTERY,**
See PLEADING, No. 10.
- BILL OF EXCEPTIONS.**
In what instances they may be allowed. *Page 435. n. b.*
- BILLS OF EXCHANGE,**
See PROMISSORY NOTES.
- BLANDFORD,**
See JUDGMENT, No. 5.
- BOND,**
See OFFICE.
1. If a bond have several conditions, and one of them be void by statute, the bond is void. *Layng v. Paine, T. 18 & 19 G. 2. C. B. 574*
 2. A general bond of resignation is void. *ib. 575*
- BURIAL.**
1. No burial fee is due at common law. *Andrews v. Cawthorne, H. 18 G. 2. C. B. 536*
 2. But it may by custom in a particular parish. *ib.*
 3. If the priest refuse or neglect to perform the office, he may be suspended

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suspended for three months by the ordinary. *Page* 538. n.

4. Or may be punished in the temporal courts by indictment or information if any inconvenience to the public arise from it. *ib.*
5. The burial fees in *Saint George's Bloomsbury* are fixed by stat. 3 G. 2. c. 49. *ib.* 540 n.

BYE-LAW.

1. A bye-law made by the Gunmakers' Company "that no member should sell the barrel of any hand-gun &c. ready proved to any person of the trade, not a member, in *London* or within four miles, and that no member should strike his stamp or mark on the barrel of any such person, not a member, under the penalty of 10*s.* for each offence," was holden not good, as being in restraint of trade. *The Master &c. of the Gunmakers' Company v. Fell, M.* 16 G. 2. C. B. 384
2. General restraints of trade are bad. *ib.* 388
3. Particular restraints either as to time or place are good, if for a sufficient consideration. *ib.*
4. Instances of bye-laws, as regulations, or as restraints, of trade. *ib.* n. b.
5. A bye-law may be good in part, though bad in part. *ib.* 390
6. A bye-law, made by the Gunmakers' Company, inflicted a penalty, half to the use of the poor of the Company, and half to the use of the discoveror, without saying who was to sue for it; the Company may sue for it; *semb.* *ib.* 391
7. A stranger (a discoveror) could

not; *semb.* [Cases referred to in n. a.] *ib.*

C

COGNIZANCE.

1. When either of the universities claims cognizance of a cause, it must be claimed before imparlance. *Welles v. Trabern, M.* 14 G. 2. C. l. 233
2. See the manner in which the claim must be made. *ib.* n.
3. When an attorney is plaintiff, the university is not entitled to cognizance of the cause. *semb.* *ib.* 240
4. In such a case the university is not entitled. [Case referred to in note a.] *ib.* 241

COMMON.

See ACTION on the Case, No. 2, 3.

1. The lord of a manor may enclose part of a common against tenants having common of pasture, notwithstanding they have also common of turbary, if he leave sufficient common of pasture. *Fawcett v. Strickland, H.* 11 G. 2 C. l. 57
2. But if the lord, in approving, injure the right of common of turbary, the person whose right is so injured may have an action against the lord. *ib.*
3. If, to trespass for driving away a commoner's cattle from the common, the lord justifies under an improvement of the common, alleging that he left sufficient common of pasture for his tenants, and the plaintiff replies that he was also entitled to common of turbary, that therefore the lord wrongfully inclosed, &c. and that he

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- he the (plaintiff) put in his cattle to enjoy his common of pasture, and the defendant demurs, it will be taken that the lord did leave sufficient common of pasture. *Page 57*
4. Common appendant only belongs to arable land. *Bennett v. Reeve, M. 14 G. 2 C. B. 227*
5. Levancy and couchancy are incident to common appendant as well as to common appurtenant. *ib.*
6. Common appendant can only be claimed for so many cattle as are necessary to plough and manure the tenant's arable land. *ib. 231*
7. The party claiming a common of pasture in pleading need not say in express terms whether it be common appendant, appurtenant, or in gross: but the Court will judge of it from the nature of the right claimed. *Musgrave v. Cave, H. 15 G. 2 C. B. 319*
8. Common of pasture, without land may be parcel of a manor, though demised and demisable by copy of court-roll; and if it be claimed by the lord of a manor in the soil of another for a certain number of cattle, without regard to levancy and couchancy, and be not claimed as incident to arable land, it will be taken to be common appurtenant. *ib.*
9. If, to an action on the case by a commoner for injuring his right of common, the defendant plead that he dug turves under a license from the lord, he should add that "sufficient common was left for the commoner," and if he do not, the plaintiff need not reply that sufficient common was not left. — *Greenbow v. Ifley, H. 20 G. 2 C. B. Page 619*
10. If a commoner, having right of common for one beast, put on two, the lord can only distrain the one put on last unless they were both turned on together; and it must be shewn in a plea (justifying the taking as a surcharge) whether they were put on together or separately, and if the latter which was put on first. *Ellis v. Rowles, M. 24 G. 2. C. B. 638*

CONDITION.

See COVENANT, No. 3, 4.

1. *A.* by will gave a rent-charge to *B.* in lieu and satisfaction of all claim she might have on his real or personal estate *and upon condition that she release* all right and claim thereto to his executors; *B.* lived several years without executing any release; held that the husband of the sister was not entitled to the arrears of the annuity, for the release was a condition precedent: but if only a condition subsequent, it ought to have been performed within a reasonable time; at all events during her life. *Asherley v. Vernon, E. 12 G. 2. C. B. 153*
2. No words in a will or deed necessarily make a condition precedent; the same words will either make a condition precedent or subsequent according to the nature of the thing and the intent of the parties. *ib. 156*
3. Instances of independent covenants, dependent and concurrent covenants, and dependent covenants or conditions precedent. — *ib. 157 B*

CONVEYANCE.

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CONVEYANCE,

See USES.

CONVICTION,

See WARRANT, No. 1.

C O S T S.

See AWARD, No. 1, 2, 3, 5, 6.

DISTRESS, No. 12. EXECUTOR, No. 8, 10, 11, 12, 13.

1. The prochein amy of an infant (plaintiff) is liable to costs, in the event of the defendant obtaining judgment. *Slaughter v. Talbot, M. 13 G. 2. C. B.* 190
2. If the plaintiff proceed after the defendant has paid money into Court, the Court will allow him *before trial* to take it out with costs to the time of paying it in, on his paying the defendant his subsequent costs. *Davis v. Mansell, H. 13 G. 2. C. B.* 191
3. But if he proceed to trial and fail, he is not entitled to the costs even up to the time of the defendant's paying money into Court. [Cases referred to in n. c.] *ib.*
4. Nor if he proceed to trial, and a juror is withdrawn. [n. c.] *ib.*
5. Nor if he enter into a consolidation rule in actions on a policy of insurance, and become nonsuit in one, is he entitled to the costs up to the time of paying money into court in the other actions that were not tried. [n. c.] 192
6. The stat. 18 *Eliz. c. 5. s. 3.*, which gives costs to the defendant in a popular action if the plaintiff be nonsuit, extends to subsequent as well as prior statutes. *Williams v. t. v. Drewe, H. 16 G. 2. C. B.* 392

And *The Mayor &c. of Plymouth v. Werring, H. 17 G. 2. C. B.* 441

7. Where a penalty is given by a statute (even subsequent to the statute of *Gloucester*) to the party grieved, he is entitled to costs if he succeed. *The Mayor &c. of Plymouth v. Werring, H. 17 G. 2. C. B.* 440
8. And if, in such case, he be nonsuit or a verdict pass against him, he is liable to pay costs to the defendant. *ib.*
9. An avowant for a rent charge is not entitled to double costs under stat. 11 *G. 2. c. 19. s. 22.* when the plaintiff is nonsuited, *Lindon v. Collins, M. 17 G. 2. C. B.* 429
10. In an action for words, where the words themselves are actionable, if the plaintiff recover less than 40s. damages, he is entitled to no more costs than damages: but where the words themselves are not actionable, the plaintiff is entitled to full costs, though he recover less than 40s. damages. *Turner v. Horton, M. 17 G. 2. C. B.* 438

COURT,

See INFERIOR COURT.

1. A court-baron cannot be holden without two freehold tenants of the manor. *Chetwode v. Crow, E. 19 G. 2. C. B.* 614
2. Such freehold tenants cannot be created at this day. *ib.*
3. If the lord now convey part of the demesnes of the manor to *A.* and his heirs and other part to *B.* and his heirs, to hold as of his manor by fealty and suit of Court, and then hold a court before those two tenants as free tenants, the court is

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- is improperly holden, and consequently any amercement at that court is bad. *ib.*
4. An amercement at a court-baron on a free suitor must be affected by two freehold tenants of the manor. [Case referred to in n. 2.] *Page 619*
5. Where the right to tithes is admitted, and a question arises between the rector and vicar to whom they are payable, that question is triable in the Spiritual Court, and consequently the common law courts will not grant a prohibition. *Cheseman v. Hoby, M. 31 G. 2 C. B. 680*
6. Whether or not the Spiritual Court has jurisdiction over a cause depends, not on the parties being ecclesiastical persons, but on the nature of the question in dispute. *ib.*
- ### COVENANT,
- See AWARD, No. 12, 13. CONDITION. TRIAL.*
1. If, to covenant for not repairing certain premises demised, the defendant plead that the plaintiff before the cause of action accrued entered and pulled down the premises and expelled him therefrom, the plaintiff may reply that he did not *expel*; &c. *mode et formâ. Hodgskin v. Queenborough, M. 12 G. 2. C. B. 129*
2. But he cannot plead an expulsion from part by the plaintiff. *ib.*
3. The lessee covenanted to put a house in repair before the 1st of *June*. "5000 slates being found allowed and delivered by the lessor towards the repair," and afterwards to keep it in repair during the term; the lessor assigned a breach for not keeping in repair after the 1st of *June*; defendant pleaded that the lessor had not *after making the lease* found allowed and delivered the slates, &c.; and plea adjudged to be bad. *Mucklestone v. Thomas, E. 12 G. 2. C. B. 146*
4. But where the lessee covenanted to repair, "the lessor allowing and assigning timber for the repairs," it was holden that the assigning of timber was a condition precedent or a qualification of the covenant to repair; and consequently that in an action against the lessee the lessor must aver that he had assigned timber, &c. *Thomas v. Cadwallader, M. 18 G. 2. C. B. 496*
5. Covenant to levy a fine of certain lands in the township of *A.* (which was in the parish of *B.*) on the request and at the costs of the grantee; breach assigned that the grantor refused to acknowledge a fine (tendered to him) of lands in the parish of *B.*; plea that the note of the fine tendered comprised other lands in *B.* than those contained in the covenant, of which the grantor was seized; and held a good plea. *Danby v. Gregg, E. 12 G. 2. C. B. 150*
6. Where several persons covenant in respect of a joint interest, the covenant is joint notwithstanding the words *cum quolibet eorum*. *Johnson v. Wilson, Tr. 14 & 15 G. 2. C. B. 254*
7. In an action against the heir on a covenant made by the ancestor it is not necessary to allege in the declaration that the heir had lands by descent: if he had none, he must plead

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- plead it. *Dyke v. Sweeting, M.*
19 G. 2. C. B. 585
8. To an action on a covenant to pay money on a particular day, the defendant cannot plead payment on a prior day; he must plead payment on the day. *ib.*
9. On a covenant to pay money at the end of six months, it will be understood to mean calendar (not lunar) months; *semb. ib.* 588
- COVENANT to stand seized.
See DEED, No. 4, 5, 6, 7, 8.
- CREDITOR,
See DEVISEE.
- CUSTOM.
1. A party cannot justify a trespass under a custom for all the inhabitants of a town to walk and ride over a close of arable land at all seasons of the year, if it appear that the trespass was committed when the corn was standing, though the party aver that it was a seasonable time. *Bell v. Wardell, E. 13 G. 2. C. P.* 202
 2. Whether a custom, so generally laid, be good? *qu. ib.* 206
 3. A custom for all the inhabitants of a town to dance at all times of the year in a close of pasture holden good. [A case cited.] *ib.* 505
 4. A custom for all the inhabitants of a town "to play at any rural sports or games in a close at all times of the year" is too general as extending to any rural sports. *Millechamp v. Johnson, Hil. 1746, C. B.* 505 n. b.
 5. In such a case "all times of the year" would be understood to mean only "legal and reasonable times of the year." *ib.* 206
 6. But a custom for all the inhabitants of a parish "to play at all kinds of lawful games, sports and pastimes at all reasonable times of the year" is good. [A case referred to.] *ib.*
 7. Though a similar custom "for all persons for the time being being in the said parish &c" is bad. *ib.*
 1. So a custom for "the poor necessitous and indigent householders of a town to cut and carry away the rotten boughs and branches" in a close is bad, on account of the uncertain description of the persons. [Case referred to.] *ib.* 207 n. a.
 9. A custom that "where the customary tenant of a manor has coal mines lying under the freehold lands of other customary tenants within and parcel of the manor; he may sink pits in those lands to get the coals &c, may lay the coals when got and the earth and rubbish &c, on the land near to such pits, such lands being customary tenements &c, there to remain and continue, (not saying how long, or for a convenient time,) may lay and continue wood there for the necessary use of the pits, may take away in carts and waggons part (not saying how much) of the coals, and burn and make into cinders the other parts there at his will and pleasure," is a bad custom, as being uncertain and unreasonable. *1 roadbent v. Wilks. T. 16 G. 2. C. B.* 360
 10. Instances of certain and uncertain customs. *ib.* 362 n. a. b.
 11. Instances of reasonable and unreasonable customs. *ib.* n. c.
 12. A custom, in a manor that the grantee of a customary estate (which passes either by deed or surrender and admittance) must be admitted.

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- mitted during the life of the grantor, is good in law. *Fenn d. Richards v. Mariott, M.* 17 G. 2. C. B. 430
13. A custom that every man inhabiting in the parish of *A.*, who marries by license in another parish, shall pay 5*s.* to the rector of *A.* for and in regard of the said marriage, is bad. *Richards q. t. v. Devey, H.* 20 G. 2. C. B. 622
14. But a custom, that every inhabitant of a parish of the age of 16 (of whatever religious sect) shall pay 4*d.* yearly as an *Easter* offering is good. *Fuller q. t. v. Say, M.* 21 G. 2. C. B. 629
15. A custom, that all the householders in the parish of *A.* shall grind all their corn which shall be used by them ground within the parish, is good. *Drake v. Wiglesworth, H.* 26 G. 2. C. B. 654
16. But a custom, that they shall grind all their corn used or sold, is bad. *ib.*
17. Such an obligation on an occupier of one of such houses is not extinguished by one of our kings having been formerly *seised in fee* of such house and of the mill at the same time. *ib.* 658
18. *Quere*, if it would not have been extinguished by the king's having *inhabited* such house? *ib.*
2. A lease and release by tenant for life do not create a forfeiture. *Grills v. Mannell, M.* 16 G. 2. C. B. Page 383
3. But a feoffment does. *ib.*
4. *A.* in consideration of an intended marriage with *B.*, by deed gave granted and conveyed certain lands to *B.* and *C.* and their assigns, to hold to the use of *B.* and her assigns for life in bar of dower, and then to the use of the heirs of the body of *B.* by *A.*, remainder over, and covenanted that the premises should remain and continue to the uses and intents aforesaid: held that this deed operated as a covenant to stand *seised*; and that an only child of the marriage was entitled after the deaths of *A.* and *B.* *Doe d. Milburn v. Salkeld, T.* 28 & 29 G. 2. C. B. 673
5. *A.* in consideration of natural love and of 100*l.* by lease and release granted released and confirmed certain premises, *after his own death*, to his brother *B.* in tail, remainder to *C.* the son of another brother of *A.* in fee; and he covenanted and granted that the premises should after his death be held by *B.* and the heirs of his body, or by *C.* and his heirs, according to the true intent of the deed: held that the deed could not operate as a release, but that it was good as a covenant to stand *seised*. *Roe d. Wilkinson v. Trammarr, H.* 31 G. 2. C. B. 683
6. Where a deed cannot operate one way, it may operate in another, to answer the intention of the parties. *ib.*
7. The requisites of a deed, operating as a covenant to stand *seised* to uses. *ib.* 685
8. The

D

DEBT.

See JUDGMENT, No. 5.

DEED.

1. No partition of land can be made without deed since the stat. 29 *Car.*
2. *Johnson v. Wilson, T.* 14 & 15 G. 2. C. B. 253
7. The requisites of a deed, operating as a covenant to stand *seised* to uses. *ib.* 685
8. The

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8. The words "covenant to stand seised to uses" are not necessary.

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9. A party may aver that there was another consideration than that expressed in the deed, if it be consistent with the deed. 677, 685

DEER.

1. Deer in an inclosed ground may be distrained for rent. *Davies v. Powell*, H. 11 G. 2. C. B. 46

DEFEAZANCE,

See PLEADING, No. 35, 36.

One deed may operate as a defeazance to another without express words of relation to it. *Trevett v. Aggas*. T. 11 & 12 G. 2. C. B. 107

2. Where a bond was conditioned for payment of money on 25th December, and a subsequent deed between the same parties was executed, by which the obligor covenanted that if the obligee should pay on the 25th of December 5s. in the pound &c. such payment should be accepted in full discharge and satisfaction of all sums due &c. and might be pleaded and given in evidence &c. ; it was holden that the defendant might plead (to an action on the bond) a tender and refusal of the 5s. in the pound on the 25th of December. 107

3. The plaintiff declared on a promissory note given to him by the defendant, and alledged that before the note was given it was agreed between them that if the defendant should buy of the plaintiff all the malt expended in his dwelling-house for three years the note should be void ; averring that the defendant had expended a certain quantity of malt &c. but had not

bought it of the plaintiff ; held good on demurrer, because the note formed no part of the agreement, or at the most that the agreement must be considered only as a defeazance, and then if the defendant would take advantage of it he should shew performance on his part. *Cornish v. Bolusbo*, E. 12 G. 2. C. B. Page 145

DEMURRER,

See JUDGMENT, No. 4. PLEADING.

DEPARTURE,

See PLEADING, No. 15, 19, 100.

DESCENT.

1. If tenant in tail of lands by purchase under a settlement made by an ancestor ex parte maternâ, with the reversion in fee by descent ex parte maternâ, suffer a common recovery to the use of himself and his heirs, the lands will descend to his heirs ex parte paternâ. *Martin d. Tregonwell v. Strachan* ; in error, *Dom. Proc. E.* 17 G. 2. 444

2. It would have been otherwise, if he had taken both estates by descent from his mother, *ib.* 448

3. If *A.* seised in fee by descent ex parte maternâ, enfeoff *B.*, and then *B.* re-enfeoff *A.* and his heirs, the line of descent is broken, and the heirs ex parte paternâ will take. [Cases referred to in] *ib.* 453. n. b.

4. So if *A.*, seised in fee of copyhold lands of inheritance by descent ex parte maternâ, surrender to *B.* in fee (a mortgagee), who on payment of principal and interest surrenders again to *A.* and his heirs, the descent is broken and the lands will descend to *A.*'s paternal heirs. *ib.*

Z z

DETINUE,

INDEX TO THE PRINCIPAL MATTERS.

DETINUE,

See BAILMENT, No. 1, 2.

1. Trover and detinue cannot be joined in the same action. *Kettle v. Bromfall*, M. 12 G. 2. C. B. 118
2. A declaration in detinue should state a request by the plaintiff on the defendant to deliver &c. *ib.*
3. Detinue will lie for goods lost and found as well as for goods delivered. *ib.*

DEVISE,

See MARRIAGE, No. 1, 2, 3, 4.

1. If a man devise to *A.* for life, and if *A.* die without issue then over, the subsequent words enlarge *A.*'s estate and give him an estate-tail. *Brice v. Smith*, E. 10 G. 2. C. B. 3
2. Or if he devise to *A.* and his heirs, and if *A.* die without issue then over, the subsequent words restrain the former devise to an estate-tail and shew that "heirs" only mean "heirs of the body." *ib.*
3. And it is immaterial whether the devise over be to the right heirs of *A.* or to a stranger. *ib.*
4. If a portion be given out of *personal estate* to be paid at such a time and the party die before, the portion shall be raised for the benefit of his representatives: aliter if it be to be raised out of the real estate; there it shall sink into the inheritance for the benefit of the heir. *Harvey v. Aston*, T. 11 & 12 G. 2. Chanc. 90, 91
5. A devise of a farm called &c. to *A.* for life, remainder to her daughter *B.* she paying to each of her

two sisters *C.* and *D.* 500*l.*; if either of them die, the survivor to have the legacy; if *B.* die, the farm to be divided between the survivors, and in case all three die before *A.*, then to the heirs of *A.* for ever; held that *C.* and *D.* were each entitled to a moiety of the farm in fee on the contingencies of their surviving their mother *A.*, and of their sister *B.* dying before she paid their legacies. *Moore d. Fagge v. Heafman*, H. 12 G. 2. C. B.; and M. 15 G. 2. B. R. in error, 138

6. So, if the latter part of the devise "in case all three die before *A.*, then to *A.*'s heirs &c." had not been added. 138
7. A devise to *A.*, he paying debts or a sum in gross, carries the fee. *ib.* 140
1. *A.* by will gave an annuity to *B.* for her life to be paid to her out of certain lands by his executor, and then devised those lands to *C.*, and appointed *C.* his executor: held that *C.* took an estate at least during the life of the annuitant. *Jenkins v. Jenkins*, M. 26 G. 2. C. B. 650
9. *Quare*, if he did not take an estate in fee? *Semb.* *ib.*
10. Devise "to my brother *T. Eagle* for life, then to the nearest of my relations, namely, to *B.* the son of *Thomas* and his heirs for ever, and after their deceases to the nearest of kindred to me, first male and then female; the house &c. to descend to the name of *Eagle*, to be kept up as long as the world shall endure, and never to be sold;" held that *B.* the son of *T.* took a fee. *Preston d. Eagle v. Funnell*, T. 12 & 13 G. 2. C. B. 164

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11. A devise to *A. and his heirs*, and if he die without heirs then to *B.* (his son or brother, &c.) and his heirs, passes only an estate-tail to *A.* *ib.* 165
- And *Ginger d. White v. White, T. 16 G. 2. C. 1.* 352
- And *Goodright d. Goodridge v. Goodridge, M. 16 G. 2. C. B.* 370
12. But if the devise over be to a stranger, *A.* takes a fee. *ib.*
13. So if the devise over be to a person of the half blood of the first devisee. [Case referred to, *n. a.*] 165
14. A devise to *A. and his heirs*, but if he die before 21 then to *B.* and his heirs, is a good executory devise to *B.*; and if *B.* survive the devisor it will descend to *B.*'s heir, though *B.* die before the contingency happens, *ff.* the death of *A.* before 21. *Goodtitle d. Gurnall v. Wood, T. 13 & 14 G. 2. C. B.* 211
15. Executory devises, when good. *ib.* 213
16. *J. S.* devised lands to *A.* till *H. C.* and *D.* attained their respective ages of 21 and then to *B. C.* and *D.* and their heirs equally to be divided between them as tenants in common, charged with the payment of an annuity of 10*l.* by *B. C.* and *D.* equally and proportionally out of their several estates: then he devised other lands to *A.* in fee; and then gave all the rest residue and remainder of his real and personal estate not before given to *E.* her heirs executors &c, and directed that his debts, &c. should be paid out of the estate given to *A.* and *E.*: it was holden that the devise to *B.*, on his dying before the devisor, was a lapsed devise; and that the heir at law of the devisor, not the residuary devisee, was entitled to *B.*'s share as not being disposed of by the will. *Doe d. Morris v. Underdown, M. 15 G. 2. C. B.* 293
17. The intent of the testator is to be taken as things stood at the time of making his will, and is not to be collected from subsequent accidents. *ib.* 297
18. When a testator gives by his will all his interest in certain lands, so that if he were to die immediately nothing would remain undisposed of, he cannot intend to give any thing in those lands to his residuary devisee. *ib.*
19. The word "estate" in a will carries the fee. *ib.* 296
20. A devise of lands to *A.* till *B.* attains the age of 21, and then to *H.* in fee, gives *B.* a vested interest, descendible to his heirs if he die before 21. *ib.* 301
21. Devise of freehold lands to the wife for life, and after her death to such child as his wife was enfeoffed in fee; *provided* that if such child as should happen to be born as aforesaid should die before 21 without issue the reversion of one third should go to the wife and the reversion of the two other thirds to the devisor's sisters; the wife was not enfeoffed at all; held that the remainder over depended on the birth of a child and its dying under 21 and without issue; and that as those events never happened the remainder over did not take effect, but that the heirs at law of the devisor were entitled to take. *Roe v. Fulham, H. 15 G. 4. C. B.* 303

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22. The word "or" in a will may be construed "and," to effectuate the intention of the devisor. *ib.* 311
 23. Under a devise to *A.* for life, and after his decease to the male children of *A.* successively and to their heirs, and in default of such male children to the female children of *A.* and their heirs, and in case *A.* die without issue then to *B.* (the elder brother of *A.*) in fee, *A.* takes only an estate for life. *Ginger d. White v. White, T. 16 G. 2. C. B.* 348
 24. The devisor, having devised lands to his wife, added "if my son *R.* (the eldest) happen to die without heirs; then my son *J.* shall enjoy my lands:" it was holden that *R.* took only an estate-tail, and that on his death without issue, and without having levied a fine or suffered a recovery, *J.* was entitled to recover from the devisee of *R.* *Goodright d. Goodridge v. Goodridge, M. 16 G. 2. C. B.* 369
 25. Under a devise to "*A.* for life, and then to his male children for their lives, and so to the male children descending from them; on their decease or failure then to *B.* and the heirs male of his body for the same term of life, and upon the same terms as the devisor intended for *A.* and his male children; and in case *B.* and his male children failing, then to *C.* and his male children, for the same term of his and their life and upon the same terms," it was holden that *A.* took an estate-tail for life only, and that on his death without male issue *B.* took an estate for life only. *Goodtitle d. Crofts v. Woodbull, M. 19 G. 2. C. B.* 592
 26. *A.* having an only child *B.* (a daughter) devised lands to a child with which his wife was then enfeint, if a male; but if a female, then the lands were to be divided between *B.* and that female; and if they both died without issue, then to *C.* in fee; the child was afterwards born, and was a male and it was ruled that he took in fee. *Davies d. Tully v. Hamlin, E. 19 G. 2. C. B.* 611
- ### DEVISEE.
1. A devisee of all the devisor's lands in trust to sell and pay all the devisor's debts, &c. cannot be sued under the stat. 3 & 4 W. & M. c. 14. *Gott v. Atkinson, H. 1 G. 2. C. B.* 52
- ### DILAPIDATIONS.
1. If a parsonage or vicarage house be destroyed by the default of the incumbent, he is bound to rebuild it. *Sollers v. Lawrence, T. 1 G. 17. G. 2. C. B.* 42
 2. But if it be burned down and the incumbent be not in fault, the Ecclesiastical Court will order fifth part of the profits of the living to be set apart in order to rebuild it.
 3. Actions for dilapidations may be maintained in the courts of common law. *ib.* 42
 4. And may be brought against the executors or administrators of the incumbent.
- ### DISSENTERS.
1. A baptist preacher qualified a

cordin

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cording to the stat. *W. & M. c.*
 18. is exempted from serving all
 parish offices, whether they ex-
 isted before or were created since
 that act, even though he be also
 engaged in trade. *Kenward v.*
Knowles, E. 17 G. 2. C. B. 463

DISTRESS,

See COMMON, No. 10. COSTS, No.
 9. ENTRY, No. 3. HERIOT,
 No. 1. PLEADING, No. 72.

1. Deer in an inclosed ground may
 be distrained for rent. *Davies v.*
Powell, H. 11 G. 2. C. B. 46
2. Corn sown by a tenant at will
 (who died before harvest) and
 purchased by another person can-
 not be distrained by the landlord
 for rent due to him from a subse-
 quent tenant, *Eaton v. Southby,*
H. 12 G. 2. 136
3. Goods taken in execution can-
 not be distrained for rent. *ib.*
4. Nor cattle distrained damage fea-
 sant. *ib.*
5. Implements in trade cannot be
 distrained for rent if they be in ac-
 tual use, or if there be any other
 sufficient distress on the premises at
 the time. *Simpson v. Hartopp, M.*
18 G. 2 C. B. 512
6. But if they be not in actual use,
 and if there be no other suffi-
 cient distress on the premises, then
 they may be distrained for rent.
ib.
7. They are only privileged sub mo-
 do. *ib.* 515
8. But things annexed to the free-
 hold or things delivered to a per-
 son exercising a trade to be carried
 or worked up in the way of his

trade, are absolutely free from dis-
 tress. 515

9. So were cocks or sheaves of corn
 before the stat. 2. *W. & M. c.* 5.
ib.
10. Goods brought to a public fair
 for sale cannot be distrained by the
 owner of the soil and fair; for
 every person has of common right
 a liberty of carrying his goods to a
 public fair for sale. *Austin v. Whit-*
ired, T. 21 G. 2. C. B. 623
11. A distress and sale given by sta-
 tute are in the nature of an execu-
 tion. *Moyse v. Cockfedge, H.* 22
G. 2 C. B. 636
12. Parish officers levying a poor rate
 under a warrant of distress may
 retain of the goods sold the neces-
 sary expences of the distress and
 sale. *ib.*
13. Whether goods taken as a dis-
 tress on a conviction under an act
 of parliament can be replevied?
Qu. Pearson v. Roberts, E. 28
G. 2. C. B. 672
14. No; *semb.* [Cases referred to in
n. b.] *ib.*

DISTRESS, Warrants of,

See WARRANT.

DROVER,

See BANKRUPT, No. 13.

EASTER OFFERING,

See FEE, No. 5.

EJECTMENT,

See ENTRY.

ENTRY.

1. *A.* by will gave a leasehold estate
 to *ib.*

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- to *B.* his executors &c., subject to a rent-charge to his wife during her widowhood, with power to the widow to enter for non-payment, and to enjoy &c. until the arrears were satisfied; and after the widow's marriage or death he willed that *B.* should pay the rent-charge to *C.* his executors &c.; the widow married, on which *C.* received the rent-charge during his life, and then *C.* died without disposing of the rent-charge, appointing *D.* his executor; held that *D.* had no right of entry for non-payment of the rent-charge, *Hassel v. Gowthwaite*, *M.* 18 *G. 2. C. B.* 500
2. If *D.* had had a right of entry, a previous demand of the rent-charge would have been necessary. *Semb.* *ib.*
3. *D.* the executor is entitled to the rent-charge *semb.*; and may distrain for it. *ib.*
4. A right of entry for non-payment must be taken strictly. *ib.* 507
- ERROR, Writ of.**
1. A writ of error is not a superſedeas until allowance or notice of it. *Merriſon v. Stevens*, *M.* 15 *G. 2. C. B.* 271
2. And if the ſheriff has levied under a fi. fa. after the iſſuing, but before the allowance, of a writ of error, he muſt proceed to ſell the goods *ib.* 280
- ESCAPE,**
- See **ARREST**, No. 2, 3.
- ESTOPPEL,**
- See **PLEADING**, No. 6.
1. Though a party to a deed be not eſtopped by a general recital, he is eſtopped by the recital of a particular fact in that deed to deny ſuch fact. *Shelley v. Wright*, *Tr.* 10 & 11. *G. 2. C. B.* 9
2. Therefore, where it was recited in the condition of a bond that the obligor had received divers ſums of money for the obligee which he had not brought to account, but acknowledged that a balance was due to the obligee, it was holden that the obligor was eſtopped to ſay that he had not received any money for the uſe of the obligee. *ib.*
3. If a defendant who is arreſted by a wrong addition to his name, put in bail thus, "*A. B.* gent. who was arreſted by the name of *A. B.* clerk," he is not thereby eſtopped to plead in abatement to the original action that he was ſued by the wrong addition. *Smithſon v. Smith*, *E.* 17 *G. 2. C. B.* 461
4. Whether he be eſtopped to plead this in abatement in an action on the bail-bond? *Qu.* *ib.*
- EVIDENCE.**
1. In an action for ſlander the defendant may under the general iſſue give in evidence the occaſion and manner of ſpeaking the words *Smith v. Richardson*, *M.* 11 *G. 2. C. B.* 21
2. But he cannot give evidence of the truth of the fact, or the general iſſue, where the words import felony or treaſon. *ib.*
3. Nor in caſes where the words do not import felony or treaſon. *ib.* 25 *n. a.*
4. The niſi prius record and the poſtea indorſed are evidence to prove that the cauſe was tried, but are not evidence to prove that a verdict was given. *Fisher v. Kitchingman* *M.* 16 *G. 2. C. B.* 36
5. A

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5. A copy of the poll taken at a borough election, examined with the original, and signed by the returning officer, is admissible evidence in an action for bribery. *Mead v. Robinson*, *M.* 17 *G. 2. C. B.* 424
 6. Parol evidence may be given to prove the voting. *Semb.* *ib.*
 7. The original precept from the sheriff to the returning officer of a borough, to proceed to an election, is admissible in evidence to prove the allegation in a declaration that such a precept issued &c. *ib.* 426
 8. An allegation in a declaration (for a malicious prosecution) that the plaintiff "by a jury of the said county &c. was duly and in a lawful manner acquitted" is proved by the production of the record by which it appeared that "the jury found the plaintiff not guilty" and upon that judgment was entered "that the plaintiff should go there-of acquitted." *Hunter v. French* *H.* 18. *G. 2. C. B.* 517
 9. The depositions of witnesses professing the *Gentoo* religion, who were sworn according to the ceremonies of their religion taken under a commission out of Chancery, may be read as evidence here. *Omichund v. Barker*, *H.* 18. *G. 2. Chanc.* 538
 10. In an action on the case for enticing away the plaintiff's wife the declarations of the wife are not admissible in evidence. *Winsmore v. Greenbank*, *M.* 19 *G. 2. C. B.* 578
- EXECUTION,
- See PRACTICE*, No. 1, 2, 3.
1. Goods are bound by the delivery of the writ of fieri facias to the sheriff; and therefore he may execute the writ notwithstanding the death of the party afterwards and before the return. *Eaton v. Southby*, *H.* 12 *G. 2. C. B.* 135
 2. If a sheriff levy under a fieri facias after the issuing, but before the allowance, of a writ of error, he must proceed to sell the goods. *Meriton v. Stevens*, *M.* 15 *G. 2. C. B.* 280
 3. An execution once regularly begun, must be completed. *ib.*
- EXECUTOR,
- See ABATEMENT*, No. 3, 4. *LIMITATIONS*, *STAT. OF*, No. 2, 3. *PLEADING*, No. 16, 17, 18, 19. *PROMISORY NOTE*, No. 5.
1. An executor may recover in his own name money due to the testator in his life-time and received by the defendant afterwards. *Shipman v. Thompson* *T.* 11. & 12 *G. 2. C. B.* 103
 2. Instances where the executor may sue in his own name. *ib.* n. 2. 104
 3. Where an executor sues in his own name for money due to the testator in his lifetime and received by the defendant afterwards, the defendant cannot set off a debt due to him from the testator *ib.* 106
 4. If a bond be given by the husband (on marriage) to trustees, conditioned to leave the intended wife a sum of money, and the wife be made the executrix of the obligor, she may retain the amount of the bond, and plead such retainer to an action brought against her by another bond-creditor of the husband. *Marriott v. Thompson*, *M.* 13 *G. 2. C. B.* 186
 5. Aliter if the bond be conditioned to pay the trustees the money in trust for the wife: but in such case the wife may pay the trustees out of the assets, or pay out of her own money and retain assets pro tanto, or confess judgment to the trustees to cover the assets. 188
 6. The

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6. The Court refused to order the administrator of a bailiff (to whom an execution had been delivered) to pay over to the plaintiff the money which he had received after the bailiff's death. *Want v. Swayne*, *M.* 13 G. 2, C. B. 185
 7. Nor would the Court grant an attachment against an administrator for not performing a rule of Court entered into by the intestate *Newton v. Walker*, *H.* 15 G. 2. C. B. 315
 8. But he may make himself liable to costs, by applying to be made party to a rule of Court in which costs are reserved. *Smales's Executors, v. Waite*, *H.* 19 G. 2. C. li. n. a. 316
 9. He may also make himself liable to the plaintiff's demand, by submitting his testator's disputes to arbitration and binding himself to perform the award. [Cases referred to in] *n. a.* 317
 10. There may be the like judgment as in case of a nonsuit against an executor plaintiff, for not going on to trial, under stat. 14 G. 2. c. 17., but without costs. *Howard v. Ratborne*, *H.* 15 G. 2. C. B. 316
 11. Plaintiff executor does not pay the costs of a nonsuit. [Cases referred to.] *ib. n. a.*
 12. But he pays the costs of a non-profs. *ib.*
 13. And costs for not going to trial according to notice. *ib.*
 14. An executor is liable to be sued for a debt or duty that the testator ought to have paid or performed. *Sollers v. Lawrence*, *T.* 16 G. 2. C. B. 421
 15. Though he is not for a mere tort of his testator. *ib.*
- EXECUTORY DEVISE,**
See DEVISE, No. 14, 15.
EXTINGUISHMENT,
See CUSTOM, No. 15. 17, 18.
F
FACTOR,
See BANKRUPT, No. 1, 2, 3, 4, 5
 6.
FAIR.
1. Every person has of common right a liberty of carrying his good to a public fair for sale; and goods brought there cannot be distrained, damage *fealast*, by the owner of the soil and fair. *Aust v. Whitred*, *T.* 21 G. 2. C. B. 62
 2. But he cannot erect stalls or place stables there for the purpose of exposing his goods thereon for sale without the consent of the owner of the soil: if he do, the owner may maintain trespass against him [Cases referred to] *ib. n. 1.* 62
- FALSE IMPRISONMENT,**
See ACTION on the Case, No. 6.
FEE.
1. No burial fee is due at common law. *Andrews v. Cawthorne*, *H.* 1 G. 2. C. B. 53
 2. But it may be due by custom in any particular parish. *ib.*
 3. The burial fees in *Saint George's Bloomsbury* are by stat. 3 G. 2. c. 19. to be fixed by certain commissioners. *ib.*
 4. A custom, that every man inhabiting in the parish of *A.*, who marries by license in another parish shall pay 5s. to the rector of *A.* for and in regard of the said marriage is bad. *Richards q. t. v. Dovey*, *H.* 20. G. 2. C. B. 62
 5. But a custom, that every inhabitant

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tant of a parish of the age of 16 (of whatever religious sect) shall pay 4d. yearly as an *Easter* offering, is good. *Fuller* q. 1. v. *Say* M. 21 G. 2. C. B. 629

FERRY,

See PLEADING, No. 83. 86.

FINE,

See COVENANT, No. 5. MESNE PROFITS.

1. A fine levied by a feme covert without her husband will bind her and her heirs if the husband do not enter and avoid it. *Acherley v. Vernon*, E. 12 G. 2. C. B. 160
2. A fine levied by an infant will bind him for ever, if he do not avoid it during his infancy. 161
3. There must be an actual entry to avoid a fine. *Tapner d. Peckham v. Meriott*, T. 12 & 13 G. 2. C. B. 182
4. And an entry subsequent to the lease in ejectment will not make it good by retrospect, so as to support an ejectment. [Cases referred to in n. a.] 330
5. But not necessary in the case of a fine at common law. [Case referred to in n. a.] 182
6. A fine by tenant for years is not tantamount to a feoffment. *Parkhurst v. Smith* lessee of *Dormer*; in error. *Dom. Proc. H.* 15 G. 2. 341
7. Such a fine is void against strangers. *ib.* 343

FISHERY.

1. The right of fishing in the sea is a right common to all the king's subjects. *Ward v. Creswell*, T. 14. & 15. G. 2. C. B. 268
2. And therefore a prescription for such a right, as annexed to certain tenements, is bad. *ib.*

FORMEDON,

See PLEADING, No. 1.

FRAUDS, *Statute of.*

1. The stat. of frauds, 29 Car. 2. c. 3. f. 14. only provides for judgments affecting land in case of purchasers. *Savil v. Wiltshire*, E. 19 G. 2. C. B. 428. n. e

GENTOO,

See EVIDENCE, No. 9.

H

HEIR,

See COVENANT, No. 7. DEVISE, No.

4.

HERIOT.

1. A lord may seize as well as distrain for heriot service. *Edwards v. Moseley*, H. 13, G. 2. C. B. 192
2. Heriots are services and part of the tenure, and such new services cannot be created or heriots reserved since the statute of quia emptores terrarum. 194
3. If a heriot be reserved by deed since that statute, payable by the tenant in fee, it will be considered as rent, and then the landlord cannot seize, but must either distrain or bring an action for non-payment. *ib.*
4. "Heriot" derived from "here" "in Saxon an army" and "geat" "which signifies provision." *ib.*

HIGHWAY,

See WAY.

HOSPITAL,

See SQUARE IMPEDIT.

I & J

JEOFAILS,

See AMENDMENT.

A a a

INDICT-

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INDICTMENT,

See PLEADING, No. 93, 94.

INFANT,

See FINE, No. 2.

INFERIOR COURT.

1. A defendant in trespass, who justifies under process of an inferior court, admits the trespass by pleading that he delivered the warrant to the officers, to whom it was directed, to be executed. *Rowe v. Tuttle*, T. 10 & 11 G. 2. C. B. 15
2. When the party (the plaintiff below) pleads a justification under the process of an inferior court, he must shew that the cause of action arose within the jurisdiction of that court. *Moravia v. Sloper*, M. 11 G. 2. C. B. 34
3. And so must the attorney for the plaintiff below, or a stranger. *ib.*
4. But the officers of the court need not. *ib.*
5. The defendant below is not concluded by the judgment (against him) of an inferior court not of record, but may plead that the cause of action did not arise within the jurisdiction. [*Herbert v. Cook*, E. 22 G. 3. B. R. 36. n. a.]
6. Nor by the judgment of an inferior court of record, even though he pleaded below. *ib.* 35. n. a.
7. In a plea of justification under the process of an inferior court it is necessary to state the nature of the jurisdiction of the court. *ib.* 37
8. A capias cannot be sued out of an inferior court without a precedent summons to warrant it. *ib.* 38
9. And if it be pleaded that at one court the plaintiff below levied his
- plaint, and such proceedings were thereupon had that *at the same court* a capias issued, it is bad, and it will not be intended that a summons issued first; *ib.* and *Marpole v. Bassett*, and *Murphy v. Fitzgerald*. *ib.* n. a.
10. But if it be pleaded that the capias issued *at a subsequent court* it will be intended that a summons issued first. *Tuley v. Foxall*, T. 31 & 32 G. 2. C. B. 68
11. An officer of an inferior court justified under a precept stated to bear date *February 26th*, issuing out of a court held *February 24th* held that the process was void as the justification bad. *Morse v. James*, M. 12 G. 2. C. B. 12
12. An officer of an inferior court cannot justify under process that is void, though he may under process that is only voidable. *ib.* 12
13. Though an officer is justified in acting under erroneous process, must be, in a case where the court out of which it issued, had jurisdiction. *ib.* 12
14. Whether it be not necessary for the officer of an inferior court, whom a precept is immediately directed, to shew a precept returned, under which he justifies? *ib.* 12
15. It is necessary. [Cases referred to.] *ib.* n.
16. A precept out of an inferior court "to attach or distrain" the goods of the defendant, to compel appearance, is good. *Johnson v. Warner*, H. 18 G. 2. C. B. 5
17. If it be stated in a plea that precept issued out of an inferior court, it will be understood that

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it was issued by the Judge of that court. 528

INHABITANTS,

See CUSTOM, No. 1, 2, 3, 4, 6, 13, 14, 15, 16, 17.

INSOLVENT,

See PLEADING, No. 60, 61.

INSURANCE.

1. Insurance on a ship (a privateer) at and from *Jamaica* to any ports &c. at sea or shore, cruizing for four months, without further account &c. &c. free from average, (before 19 Geo. 2. c. 37.); the insured had interest in the ship to the amount insured; during the four months the crew mutinied, brought the ship by force into *Jamaica*, and having carried away the arms &c. deserted her, by which the further cruize was prevented; held that the assured could not recover, as the ship was in safety in her proper port at the end of the four months. *Pole v. Fitzgerald*: in error. *Cam. Scacc.* E. 25 G. 2. 641

JOINDER of Action.

1. Trover and detinue cannot be joined in the same action. *Kettle v. Bromfall*, M. 12 G. 2. C. B. 120
2. Only those causes of action can be joined that admit the same pleas. *ib.*
3. And the same judgment also. *ib. n. a.*

JUDGMENT.

1. The Court permitted judgment to be entered up on a warrant of attorney against a defendant in *Jamaica*, on an affidavit that he was alive five months before. *Rowndell v. Powell*, H. 11 G. 2. G. B. 66
2. The Court will order judgment to be entered up for the plaintiff in

trespass, notwithstanding a verdict for the defendant on a plea of justification, if the justification be bad in law. *Broadbent v. Wilks*, T. 16 G. 2. C. B. 364

3. Though a plaintiff or defendant pray a wrong judgment, the Court must give such judgment as the party is entitled to. *Rayner v. Pointer*, E. 16 G. 2. C. B. 410
4. And therefore if the defendant in a demurrer to a declaration, pray judgment of the declaration, and that it may be quashed, and the plaintiff join in demurrer, and the declaration be good, the Court will give judgment in chief in favour of the plaintiff. *ib.*
5. By stat. 15 G. 2. c. 16. for rebuilding *Blandford* then lately burned down, commissioners were appointed (who were made a court of record) to settle all differences and demands &c. between all persons their heirs executors administrators successors or assigns touching the building &c. and authority was given to them to direct any alterations in the foundations of the new building &c. by taking or giving ground from one to another, and ordering satisfaction to be made by one to the other &c; under this act the Court ordered the sum of 100 l. to be paid by A. the executor of the late vicar of B. (whose house was burned down in his life-time) to C. the succeeding vicar; held first, that the order (the judgment) was conclusive on A. personally, though it did not appear on the record that A. had received assets to that amount; 2dly. that C. might maintain debt against A. for that sum; and 3dly, that A. could not plead to such action a bond debt of the testator

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- still unpaid and no assets ultra.
Sollers v. Lawrence, T. 16 & 17 G. 2. C. R. 413
6. A judgment signed in term time relates back to the first day of term, and a judgment signed in the vacation relates to the first day of the preceding term. *Fann v. Atkinson, M. 17 G. 2. C. B.* 427
Savil v. Wilsbire, E. 19 G. 2. C. B. *ib.* 428. n. a.
7. And therefore the Court will not set aside a judgment signed after the death of the defendant when by such relation it becomes a judgment of the preceding term when the defendant was alive. *ib.*
8. In this respect there is no difference between an adverse judgment and a judgment signed under a warrant of attorney. *Hall v. Mose, T. 16 & 17 G. 2. C. B.* 428. n. a.
9. Form of judgment in replevin. 481, 2
10. If a declaration on a statute conclude contra formam statuti, and the defendant be found guilty, the judgment need not so conclude. *Myddleton v. Wynn Bart; in error; Cam. Scacc. H. 19 G. 2.* 599
11. The judgment in an action on the case on statute, brought by the party grieved, may be in misericordia. *ib.* 600

JUDGMENT *as in Case of a Non-suit.* See EXECUTOR, No. 10.

JURISDICTION,

See ACTION, No. 3. COGNIZANCE. COURT.

JUROR.

1. The Court set aside the verdict, because one of the jurymen was not returned on the nisi prius

panel but answered to the name of a person who was. *Norman v. Beament, M. 18 G. 2. C. B.* 484

2. But where one of the jurors, whose christian name was *Harry*, was named *Henry* in the venire, habeas corpora, and the posita, the Court refused to set aside the verdict given by him and 11 other jurymen properly named. *Wray v. Tborn, M. 18 G. 2. C. B.* 488
3. The Court will not now receive the affidavit of a juror respecting the misconduct of the jurymen [Cases referred to n. a.] 488

JUSTICE,

See REPLEVIN, No. 2.

K

KING.

1. The defendant cannot plead several matters under the stat. 4 & 5 An. c. 16. when the King is plaintiff. *The King v. The Archbishop of York, H. 18 G. 2. C. B.* 531
2. A nisi prius cannot be granted where the King is a party. *ib.* 531
3. The King is not included in statutes mentioning merely plaintiff and defendant. 53

L

LANDLORD AND TENANT,

See NOTICE to quit. LEASE.

1. If the estate of a tenant at will be determined either by his death or by the act of the landlord, he or his executors may reap the corn sown by him. *Eaton v. Southby, H. 12 G. 2. C. B.* 131
2. And therefore the corn sown by tenant at will (who died before harvest) and purchased by another person cannot be distrained by the landlord

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landlord for rent due to him from
a subsequent tenant. *ib.*

LEASE,

See NOTICE TO QUIT.

1. A tenant for life, having power to grant building leases for 61 years reserving the best improved ground rent, granted a lease for that term, which was not expressed to be a building lease but which contained a covenant by the lessee to keep in repair the demised premises (old houses) or such other houses as should be built during the term; held that this was not a building lease within the power. *Jones d. Cowper v. Verney*, T. 12 & 13 G. 2. C. B. 169
2. Such a lease being granted by a tenant for life who had a bare naked power without any legal interest is void, and not capable of confirmation by the remainder man accepting rent. *ib.* 176
3. A voidable lease may be made good by acceptance of rent. *ib.*

LEGACY,

See DEVISE. MARRIAGE, No. 1, 2, 3, 4.

LIBERUM TENEMENTUM,

See PLEADING, No. 63, 64, 65.

LICENSE.

1. If *A.* license *B.* to enter his house to sell goods, *B.* may take assistants, if necessary, for the purpose of selling the goods. *Dennett v. Grover*, H. 13 G. 2. C. B. 195
2. Aliter, where the license to enter is not for profit but pleasure. [note *a.*] *ib.*

LIMITATIONS, Statutes of,

See PLEADING, No. 16, 17, 19,

1. Where the statute of limitations is pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will. *Hickman v. Walker*, M. 11 G. 2. C. B. 27
2. But where an action commenced in time abates by the death of the testator or intestate, it may be revived by the executor or administrator within a year afterwards. [note *a.*] 257
3. If defendant plead the statute of limitations to an action brought by an executor on a promise made to the testator, the plaintiff cannot reply a subsequent promise to himself, because that would be a departure in pleading. *Hickman v. Walker*, 27
4. In pleading a writ sued out within 6 years after the cause of action arose, in order to save the statute of limitations, it is necessary to allege that the writ was returned. *Karver v. James*, T. 14 & 15 G. 2. C. 255
5. A capias, without an original, is sufficient for this purpose. *ib.* 257
6. Even though the capias be returnable on a common return day, and not on a day certain; for such a writ is only voidable not void. *ib.* 258

LORD,

See COMMON. COURT, No. 1, 2, 3, 4. HERIOT. MANOR.

M

MANOR,

See COURT, No. 1, 2, 3, 4. CUSTOM, No. 12.

1. Common

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1. Common of pasture, without land, may be parcel of a manor, though demised and demisable by copy of court-roll. *Musgrave v. Cave*, H. 15 G. 2. C. B. 323
2. Things merely incorporeal may be granted by copy of court-roll. *ib.* 324

MARKET,

See FAIR.

MARRIAGE,

See EXECUTOR, No. 4, 5.

1. A bequest of money, to be raised out of land, to daughters "when and as soon as they should marry with consent of trustees, and if they should die before marriage with such consent" then the portions should not be raised; two of the daughters married without consent; held that they were not entitled to their portions. *Hervey v. Afton*, Tr. 11 & 12 G. 2 Chanc. 83
2. But if they survived their husbands, and married again with such consent, then they would be entitled. *ib.*
3. Where there is a devise on condition of marrying with consent, and no devise over, it is evidence of the testator's intention that the condition is only in terrorem. *ib.* 95, 96
4. When the residuary legatee is the person to consent to or dissent from the marriage, whether it be not necessary for him to shew some reasonable cause of objection? *Qu.* 98
5. A custom, that every man inhabiting in the parish of A, who marries by license in another parish, shall pay 5s. to the rector of A. for and in regard of the said mar-

riage, is bad. *Richards q. t. v. Dovey*, H. 20 G. 2. C. B. 622

MESNE PROFITS.

1. When a remainder man has made an actual entry to avoid a fine, a Court of Enquiry will decree the wrongful possessor to account to him for the rents and profits from the time when his title first accrued, even those that accrued before he made the entry. *Dormer v. Fortescue*. n. s. 343
2. But in a Court of Law the party can only recover the profits that accrued after such actual entry. [Case referred to.] *ib.*

MILL,

See CUSTOM, No. 15, 16, 17, 18.

MISTRIAL,

See TRIAL.

MONTHS,

See COVENANT, No. 9.

N

NAME,

See PLEADING, No. 89.

1. A man cannot have two Christian names. *Evans v. King*, E. 18 G. 2. C. B. 554

NEGATIVE,

See VERDICT SPECIAL.

NISI PRIUS,

See EVIDENCE, No. 4.

NOTICE TO QUIT.

1. Demise from A. to B. for 21 years if both should so long live; but if either should die before the end of the term, then the heirs executors &c. of the person dying should give

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- give 12 months' notice to quit; held that the lease could only be determined by 12 month's notice given by the representatives of the party dying before the end of the term; and consequently that such notice given by the lessor to the representatives of the lessee (who died during the term) did not determine it. *Legg v. Scott v. Benion*, H. 11 G. 2. C. B. 43
2. Where power is given to a party to determine a lease on giving a notice in writing, he cannot determine it by a parol notice. *ib.* 44
- O
- OFFICE,
- See DISSENTERS.
1. An agreement with the warden of the Fleet (who held only for life under the crown) that for a sum of money he would surrender the office to the King, to the intent that he should procure from the King a grant of the office to the purchaser, is void by stat. 5 & 6 Ed. 6. c. 16.; though that office has been, and may be, granted to a subject in fee. *Huggins v. Cambridge*, H. 14 G. 2. C. B. 241
 2. And a bond given to secure the payment of such consideration money cannot be enforced in a court of law. *ib.*
 3. It is not sufficient in a plea to an action on such a bond to state generally that the case is within the statute: the defendant must set forth in his plea facts to shew that the case is within the statute. *ib.* 247
 4. The exception in the stat. 5 & 6 Ed. 6. c. 16., that the act shall not extend to any office of which any person is seized of any estate of inheritance, means only offices of which subjects are seized of estates of inheritance. *ib.* 246
 5. The office of registrar of an archdeaconry is an office within the meaning of that statute. *Layng v. Paine*, T. 18 & 19 G. 2. C. B. 573
 6. A court of equity has interposed in some cases where it has been thought the courts of law could not. [Cases referred to in n. a.] *ib.* 577
 7. A bond given by any of the officers mentioned in that statute, for securing all the profits of the office to the person appointing, is void by the statute. *ib.*
 8. So is a bond given by such an officer to surrender whenever the person appointing shall choose. *ib.* 574
 9. An officer, having a certain salary or profits, may make a deputation of the office reserving a sum not exceeding the certain profits. [Case referred to n.] *ib.* 576
 10. So, where the profits are uncertain, he may grant the office to a deputy, reserving any sum out of the profits. *ib.*
 11. But where the profits are uncertain, he cannot grant the office &c. to a deputy, reserving a certain sum at all events. *ib.*
- ORDER,
- See JUDGMENT, No. 5.
- OYER.
1. A defendant, who prays oyer of a deed, is entitled to a copy of the attestation and of the names of

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of the witnesses, as well as of every other part of the deed.
Longmors v. Rogers, M. 15 G. 2.
 C. B. 288

P

PAPIST.

1. A papist, who has not taken the oaths &c. (under an incapacity to hold under stat. 11 & 12 W. 3.) may devise lands to a protestant.
Mallom d. Marsh v. Bringloe, E. 11 G. 2. C. B. 75
2. He may sell to a protestant, by stat. 3 G. 1. c. 18. *ib.*
3. He may devise for payment of his debts to protestants. *ib.*
4. And may charge lands by a bond &c. *Semb.* *ib.*
5. A protestant may devise lands to be sold for payment of his debts to papists. [Cases cited.] *ib.* 82. n. a.
6. New oaths to be taken by papists by stat. 18 G. 3. c. 60.; and 31 G. 3. c. 32. *ib.* 78. n.

PARSON,

See DILAPIDATIONS.

PARTITION,

See AWARD, No. 12. DEED, No. 1.

PARTY *grieved*,

See COSTS, No. 7, 8.

PAYMENT,

See COVENANT, No. 8, 9.

PAYMENT of money into Court.

See COSTS, No. 2, 3, 4, 5.

PENALTY,

See BYE-LAW, No. 1, 6, 7.

PLEADING,

See ABATEMENT. ACCOUNT, No. 5. ASSUMPSIT, No. 6. COMMON, No. 3. 10. CUSTOM, No. 9. DEFEAZANCE, No. 3. DETINUE, No. 1, 2. ESTOPPEL. EXECUTOR, No. 4, 5. INFERIOR COURT. JUDGMENT, No. 2, 3, 4, 5, 9, 10, 11. PROPERT. TROVER.

1. A demandant in formodon, who claims under a devise with a condition, may set forth the devise only without the condition. *Brier v. Smith*, E. 10 G. 2. C. B. 1
 2. The party need not verify a negative. *Harvey v. Stokes*, E. 10 G. 2. C. B. 6
 3. If a party conclude, and "this he is ready to certify" instead of "verify," it is no objection. *ib.*
 4. Where the defendant pleads a matter of excuse which admits a non-performance (except in the case of an award) the plaintiff need not assign a breach in his replication. *Shelly v. Wright*, T. 10 & 11 G. 2. C. B. 12
 5. Aliter, where the defendant pleads a performance. *ib.*
 6. When a plaintiff replies that the defendant is estopped to plead his plea, he may demand judgment generally. *ib.* 13
 7. When several defendants plead a joint plea, if it be bad as to one defendant, it is bad as to all. *Ross v. Tuttle*, T. 10 & 11 G. 2. C. B. 15
- Moravia v. Sloper*, M. 11 G. 2. C. B. 32
- And *Morse v. James*, M. 12 G. 2. C. B. *ib.* 128
- And *Dennett v. Grover*, H. 13 G. 2. C. B. 196

8. A defen-

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8. A defendant must admit the trespass, in order to justify it. *Rowe v. Tutte*, T. 10 & 11 G. 2. C. B. 15
9. A defendant in trespass, who justifies under process of an inferior court, admits the trespass by pleading that he delivered the warrant to the officers, to whom it was directed, to be executed. *ib.*
10. A defendant may justify an assault and battery by pleading *molliter manus imposuit* &c. in order to arrest &c. *ib.* 16
And *Tuley v. Foxall*, T. 31 & 32 G. 2. C. B. 690
11. So he may justify a battery in the defence of his possession of lands or goods by pleading *molliter manus imposuit*. 16. n. b.
12. Or even without pleading *molliter manus imposuit*, if actual force be used by the plaintiff. *ib.* n. b.
13. If it do not appear on the record that there is a condition to a recognizance, on which an action is brought, the court will not intend that there is any condition. *Crosse v. Porter*, M. 11 G. 2. C. B. 18
14. But if it appear on the record that there is a condition, the declaration is bad unless the condition be set forth therein. *ib.*
15. To debt on bond, given by defendant on his marriage with condition that he would permit his intended wife to dispose of 50*l.* out of his personal estate, defendant pleaded that he had not prevented his wife disposing of that sum; plaintiff in his replication set forth a particular disposition of the money by the wife, and a request on defendant to pay, and a refusal by him; defendant rejoined that he had not any personal estate out of which he could pay the 50*l.*; rejoinder held bad, 1st. because it was a departure from the plea; 2dly. because it would have been no defence if pleaded at first. *Coffens v. Coffens* M. 11. G. 2. C. B. 25
16. Where the statute of limitations is pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will. *Hickman v. Walker*, M. 11 G. 2. C. B. 27
17. But where an action commenced in time abates by the death of the testator or intestate, it may be revived by the executor or administrator within a year. [n. a.] 257
18. In pleading a writ sued out within six years after the cause of action arose, in order to save the statute of limitations, it is necessary to allege that the writ was returned. *Karver v. James*, T. 14 & 15 G. 2. C. B. 255
19. If defendant plead the statute of limitations to an action brought by an executor on a promise made to the testator, the plaintiff cannot reply a subsequent promise to himself, because that would be a departure in pleading. *Hickman v. Walker*, M. 11 G. 2. C. B. 27
20. When the party (the plaintiff below) pleads a justification under the process of an inferior court, he must shew that the cause of action arose within the jurisdiction of that court. *Moravia v. Sloper*, M. 11 G. 2. C. B. 34
21. And so must the attorney for the plaintiff below, or a stranger. *ib.*
22. But the officers of the court need not. *ib.*
23. The

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23. The defendant below is not concluded by the judgment (against him) of an inferior court not of record, but may plead that the cause of action did not arise within the jurisdiction. [*Herbert v. Cook*, *E. 22 G. 3. B. R.*] *ib.* 36.
n. a.
24. Even though he pleaded below. *ib.* 35. n. a
25. In a plea of justification under the process of an inferior court it is necessary to state the nature of the jurisdiction of the court. *ib.* 37
26. A *capias* cannot be sued out of an inferior court without a precedent summons to warrant it. *ib.* 38
27. And if it be pleaded that at one court the plaintiff below levied his plaint and such proceedings were thereupon had that at the same court a *capias* issued, it is bad, and it will not be intended that a summons issued first. *Ib.* and *Marpole v. Bafnett*, and *Murphy v. Fitzgerald.* *ib.* n. a
28. But if it be pleaded that the *capias* issued at a subsequent court, it will be intended that a summons issued first. *Titley v. Foxall*, *T. 31 G. 2. C. B.* 688
29. Replication *de injuriâ suâ propriâ absque tali causâ* is bad where the defendant insists on a right. *Cooper v. Monke*, *H. 11 G. 2. C. B.* 54
And *Cockerill v. Armstrong*, *Tr. 11 & 12 G. 2. C. B.* 99
30. And it is immaterial whether the defendant insists on the right in himself, or whether he justifies by command of another claiming that right. 102
31. So it is bad where the replication puts several matters in issue; as where replied to a plea (to trespass for taking cattle) that *A.* was seised in fee of the locus in quo, and that defendant as his servant took the cattle damage feasant. 99
And *Bell v. Wardell*, *E. 13 G. 2. C. B.* 204
32. So a plea *de injuriâ suâ propriâ absque tali causâ* to a cognizance for rent is bad. 100 n. a.
33. When (in trespass) the defendant justifies taking the goods as a distress for rent, the plaintiff in his replication must either admit or deny the rent in arrear; replying *de injuriâ suâ propriâ* is improper. 54
34. Where the defendant justifies (in trespass for taking the plaintiff's goods and converting them &c.) taking them as a distress for rent, the taking and converting are considered as the same thing; and therefore it is not inconsistent in a plea of justification, as to the taking and converting, to say that he took all the goods, as a distress, and afterwards to say that he left part of them in the plaintiff's possession. *ib.* 55
35. In pleading a tender of a sum of money according to a defeazance, which is in a different instrument from the original deed, it is not necessary either to plead that the party has always been and still is ready to pay, or to bring the money into court. *Trevett v. Aggas*, *T. 11 & 12 G. 2. C. B.* 110
36. Aliter, if the defeazance be in the same deed. *ib.*
37. An officer of an inferior court justified under a precept stated to bear date February 26th, issuing out

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- out of a court held *February* 24th; held that the process was void, and the justification bad. *Morse v. James, M. 12 G. 2. C. B.* 122
38. An officer of an inferior court cannot justify under process that is void, though he may under process that is only voidable. *ib.* 125
39. Though an officer is justified in acting under erroneous process, it must be in a case where the court, out of which it issued, had jurisdiction. *ib.* 128
40. Defendant justified as an officer of an inferior court for trying causes touching mines and miners within certain limits; the plea was holden bad, because it did not allege that the defendant below was a miner "at the commencement of the suit below" but only "when the execution issued." 128
41. A sheriff, who justifies under a writ (mesne process,) must shew it returned, though his bailiffs need not. *ib.* 126
42. Whether it be not necessary for the officer of an inferior court, to whom it's precepts are directed, to shew a precept, under which he justifies, returned? *Qu. ib.* 127
43. It is necessary. [Cases referred to.] *ib. n. a*
44. A sheriff, or officer, who justifies under a writ of execution need not shew it returned. [Cases referred to.] *ib.* 126. n. b.
45. If a plea of justification under a precept of an inferior court shew the return, as well as the precept itself, it must conclude prout patet per recordum, even though it were not necessary to state the return. *ib.* 126.
46. Where an officer of an inferior court justifies under a precept to take the goods of *A. B.* in execution, the precept and return are not merely inducement but of the substance of the justification. *ib.* 127
47. So is a judgment, in an action of debt on the judgment. *ib.*
48. But in an action for an escape, the judgment and execution are only inducement; and where a matter of record, that is only inducement, is insisted on in a plea, the plea need not conclude prout patet per recordum. *ib.*
49. If the plaintiff in an action in an inferior court, or a mere stranger, justify under process, he must set forth the proceedings at length. *ib.* 128
50. Whether a person, who acts at the request of the officers and in their aid in executing civil process of an inferior court, be such a stranger? *Qu. ib.* 129
51. A person, who so acts in executing criminal process, is not. *Semb. ib.*
52. A plea of justification under the process of an inferior court holden "at the forest of *D.*," without stating in what particular part of the forest, good. *Semb. ib.*
53. If, to covenant for not repairing certain premises demised, the defendant pleaded that the plaintiff before the cause of action accrued entered and pulled down the premises and expelled him therefrom, the plaintiff may reply that he did not expel &c modo et forma. *Hodgskin v. Queenborough, M. 12 G. 2. C. B.* 129
54. But he cannot plead an expulsion from part. *ib.*
55. Plea alleging that *A.* having been lawfully possessed &c. as tenant at will to *B.* is a sufficient averment
- Bbbz

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- avermert that *A.* was tenant at will to *B.* *Eaton v. Southby H.* 12 G. 2. C. B. 131
56. Pleading that corn which had been cut was left on the ground until it was fit in a course of husbandry to be carried is sufficient, without saying how long it remained there; the reasonableness of the time being a question of fact for the jury, and not a question of law for the Court. *ib.* 134
57. So when a party justifies under a custom for all the inhabitants of a town to go over a close at all *seasonable times* of the year, *seasonable time* is partly a question of law and partly of fact. *Bell v. Wardell, E.* 13 G. 2. C. B. 206
58. If *A.* license *B.* to enter his house to sell goods, *B.* may take assistants if necessary for the purpose of selling the goods: and if it be pleaded that *A.* and also *C.* and *D.* his servants and by his command entered for that purpose, and *necessarily continued* there so long, it will be understood that it was necessary for them to enter. *Dennett v. Grover, H.* 13 G. 2. C. B. 195
59. In pleading a judgment of a court of limited jurisdiction it is necessary to state those facts that give that court a jurisdiction; and having stated those, the party may allege generally that that court gave such a judgment. *Ladbroke v. James H.* 13 G. 2. C. B. 199, and *Sollers v. Lawrence, T.* 16 G. 2. C. B. 413
60. The insolvent act, 10 G. 2., gave the court of quarter sessions power to discharge certain persons who had surrendered before a certain time; it was ruled that in pleading a discharge by a court of sessions it was necessary to allege that the party was in prison or had surrendered himself before that time. 199
61. Saying "that he was duly discharged by the court of quarter sessions from his imprisonment aforesaid" is not sufficient. *ib.*
62. Justification (in trespass) under a custom for all the inhabitants of a town to walk and ride over a close of arable land at all *seasonable times* in the year was holden bad, because it appeared in the plea that the trespass was committed when the corn was standing, though the defendant averred that it was a *seasonable time.* *Bell v. Wardell, E.* 23 G. 2. C. B. 202
63. To a plea of *liberum tenementum* the plaintiff may reply that the place in question is the soil and freehold of the plaintiff and not the soil and freehold of the defendant. *Lambert v. Stroober, M.* 14 G. 2. C. B. 218
64. When the plaintiff names the close in his declaration in trespass, whether the defendant can plead *liberum tenementum*? *Qu. ib.* 224
65. To the plea of *liberum tenementum* the plaintiff may reply in either of three ways; 1st, he may traverse the defendant's plea, and then it is immaterial whether or not he sets forth his own title; 2dly, he may admit the freehold to be in the defendant and insist on a lease or some other title under him; or 3dly, that before the defendant had any thing in the premises, *A. B.* was seised in fee and made a lease either to the plaintiff or to a person under whom he claims, which is sufficient, without confessing or denying the defendant's plea. *ib.* 225
66. When a defendant wishes to avoid a contract

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- a contract as being made contrary to a statute, he must in his plea set forth facts to shew that the case is within the statute: saying generally that the case is within the statute is insufficient. *Huggins v. Bambridge*, *H.* 14 G. 2. C. B. 247
67. A prescription for a right to fish in the sea, as annexed to certain tenements, is bad, because it is a right common to all the King's subjects. *Ward v. Cresswell*, *T.* 14 & 15 G. 2. G. B. 265
68. A prescriptive right claimed in respect of certain ancient tenements &c, without saying how many, is bad. *Semb.* *ib.* 267
69. If a man have a prescriptive right in respect of one tenement and 10 acres and another in respect of another tenement and 10 acres, he must make two several titles in pleading. *ib.*
70. In a counterplea (to a prayer of view in a real action) it is not sufficient for the defendant to say that the tenant is in actual possession of the lands demanded; he must also add, "and of no other lands in the same vill." *Davis v. Lees*, *Tr.* 16 G. 2. C. B. 348
71. Where a justification in trespass is bad in point of law, the court will order the judgment to be entered up for the plaintiff, notwithstanding a verdict for the defendant on the plea of justification. *Broadbent v. Wilks*, *T.* 16 G. 2. C. B. 364
72. The defendant in his avowry in replevin stated that by lease and release he in consideration of an annuity therein mentioned conveyed certain premises containing the place where &c to the plaintiff in fee, subject to a rent-charge payable to the defendant during her life, with power of distress for non-payment of the annuity, and that by virtue of the lease and release and by force of the statute &c the plaintiff became seised in fee &c, and then she justified as a distress for non-payment of the annuity: pleas in bar, 1st, that the plaintiff never was seised &c in fee; 2dly, (admitting that the defendant did by the lease bargain and sell &c to the plaintiff for a year,) that at the time of making the bargain and sale the defendant was only seised &c for her life, the reversion in fee then belonging to another, traversing that the defendant was seised in fee of the reversion: both these pleas were holden bad on demurrer; the first, because it denied what was before admitted, and because it traversed only a consequence of law; the second, because it admitted that the defendant had an estate sufficient to justify the distress. *Grillis v. Munnell*, *M.* 16 G. 2. C. B. 378
73. The facts pleaded in one plea can neither assist or invalidate another plea on the same record. *ib.* 380
74. In an action for a penalty for breach of a bye-law, whether it should not be positively stated that the defendant was subject to the bye-law when he did the act complained of? *Qu. The Gunmakers' Company v. Fell*, *M.* 16 G. 2. C. B. 390
75. Whether it be sufficient in such a case to state that the fact was done on a day (after a videlicet) after he was subject to the bye-law, as it appears by other parts of the declaration? *Qu. ib.*
76. It is sufficient for the assignee of a bail-bond to state in his declaration that the sheriff assigned the

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- the bond to him *according to the form of the statute*, without adding that "the assignment was under the hand and seal of the sheriff." *Dawes v. Papworth*, E. 16 G. 2. C. B. 408
77. To such a declaration the defendant may plead that the sheriff did not assign &c. according to the form of the statute; and the plaintiff may tender an issue on it in those words. *ib.*
78. In an action for a penalty under the bribery act, 2 G. 2. c. 24., it is sufficient to state that the defendant corrupted *A. B.* (a voter &c.) to vote for *C. D.* by giving him a sum of money *as a gift or reward* for his the said *A. B.*'s giving his vote &c.; without saying that he gave *A. B.* that sum for the purpose of bribing him to give his vote &c. *Mead v. Robinson*. M. 17 G. 2. C. B. 427
79. A declaration in replevin should specify the place where the goods were taken: but the defect is cured by the defendant's pleading; he should demur. *Bullyborpe v. Turner*, B. 17 G. 2. G. B. 475
80. A plea of cepit in alio loco (in replevin) is a plea in bar, (not in abatement,) though it pray judgment of the declaration. *ib.* 477
81. In replevin the defendant pleaded cepit in alio loco, and avowed taking the goods in such other place whither they had been fraudulently conveyed within 30 days &c. from the demised premises, as a distress for rent: the plaintiff in his plea in bar traversed the avowry, and took no notice of the plea; and on demurrer it was holden ill, the avowry being in the nature of a suggestion to entitle the party to a return of the distress, and not traversable. 477
82. Form of judgment in replevin. *ib.* 481, 2
83. In action on the case by the owner of an ancient ferry against a person who erects a new ferry near to his, the plaintiff may declare on his possession. *Bliss v. Hart*, M. 18 G. 2. C. B. 508
84. So, in an action on the case by a commoner against a stranger and wrong-doer. *Greenbow v. Hyley*, H. 20 G. 2. C. B. 621
85. But in action against the lord, he must set forth his title. *ib.*
86. In a declaration in such an action by the owner of the ferry he need not set forth that he keeps boats and ferrymen sufficient to carry passengers over. *ib.*
87. In an action for a malicious prosecution, in charging the plaintiff with conspiring with others to defraud the defendant of the interest of an *East India* bond, the declaration stated that the bond bore interest "as therein *is* (not *was*) mentioned," and held good. *Jackson v. Sharp*, H. 18 G. 2. C. B. 525
88. The defendants justified, in trespass, under a right of common of pasture: the plaintiff replied an inclosure and approvement of the place where &c. by the lord of the manor, averring a sufficiency of common left for the defendant "and all other persons of right having and using common &c.;" the defendant traversed the sufficiency in those words; and after verdict for the plaintiff on an issue on

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- on that traverse the Court refused to grant a repleader, saying those words meant "all persons having a right to use the common." *Parnham v. Pacey*, H. 18 G. 2. C. B. 532
89. When the King is plaintiff in a quare impedit, the defendant cannot plead several matters under the stat. 4 & 5 An. c. 16. *The King v. The Archbishop of York*, H. 18 G. 2. C. B. 533
90. Though at common law a defendant could not plead several matters in a quo warranto information, he may by stat. 32 G. 3. c. 58. f. 1. *ib.* 534. n. a.
91. It is a bad plea in abatement, that the defendant's name of baptism is not so and so. *Evans v. King*, E. 18 G. 2. C. B. 553
92. In an action on the case for enticing away the plaintiff's wife, it is not necessary to set forth the means used by the defendant to entice &c. *Winsmore v. Greenbank*, M. 19 G. 2. C. B. 583
93. Nor is it necessary to set forth the means used by the defendants in an indictment for a conspiracy. [Case referred to.] *ib.* n. a.
94. Nor in an indictment under stat. 37 G. 3. c. 70. for endeavouring to seduce soldiers from their allegiance. *ib.*
95. In an action against the heir on a covenant made by the ancestor it is not necessary to allege in the declaration that the heir had lands by descent: if he had none, he must plead it. *Dyke v. Sweeting*. M. 19 C. 2. C. B. 587
96. Nor is it necessary in an action of debt against the heir. *ib.*
97. To an action of covenant to pay money on a particular day the defendant cannot plead payment on a prior day: he must plead payment on the day. *ib.* 586
98. In a plea of tender the defendant must say he was always ready to pay: ready from the time of the tender is not sufficient. *Haldenby v. Tuke*, M. 21 G. 2. C. B. 632
99. To a plea of tender the plaintiff replied a demand and refusal before suing out the writ: rejoinder that before suing out the writ the defendant tendered &c; traversing that at any time after the tender and before suing out the writ the plaintiff requested him to pay &c; rejoinder bad. *ib.*
100. Defendant in a plea justified taking cattle *damage feasant*, and afterwards rejoined that they were taken *furcharging* the common: held to be a departure. *Ellis v. Rowles*, M. 24 G. 2. C. B. 638

POLICY,

See INSURANCE.

POOR RATE,

See DISTRESS, No. 12.

POSTEA,

See EVIDENCE, No. 4.

POWER OF ATTORNEY,

See ATTORNEY, No. 1, 2.

PRACTICE,

See COSTS, No. 2, 3, 4, 5. EXECUTION. JUDGMENT, No. 1.

1. The Court refused to set aside the execution in the second action, (a writ of error having been brought on the first judgment,) because the defendant had not before applied to stay the proceedings in the second action. *Robinson v. Tuckwell*,

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- v. Tuckwell, M.* 13 G. 2. C. B. 183
2. And in such case it is immaterial whether the execution has been executed or the writ only delivered to the sheriff to be executed. *Clarkson v. Phylck, M.* 13 G. 2. C. B. 184
3. The Court refused to order the administrator of a bailiff (to whom an execution had been delivered) to pay over to the plaintiff the money which he had received after the bailiff's death. *Want v. Swayne, M.* 13 G. 2 C. B. 185
4. Venue charged, after an order for time to plead. *Rowley v. Allen, H.* 15 G. 2. C. B. 318
5. But not where the defendant is under terms to plead issuably and take short notice of trial at the first sittings in *London* or *Middlesex*. [Cases referred to in n. b.] *ib.*
6. If a rule be moved for to stay the proceedings in a bail-bond, it must not be entitled in the original cause but in the action on the bail-bond. *Smithson v. Smith, E.* 17 G. 2. C. B. 461
7. Bringing an action on a judgment within two terms is not equivalent to charging the defendant in execution within two terms, within the rule, *E.* 8. G. 1. *Childs v. Prowse, H.* 18 G. 2. C. B. 531

PRECEPT.

See INFERIOR COURT, No. 14, 15, 16, 17.

PRESCRIPTION,

See WAY, No. 1, 2, 5.

PRESENTATION.

1. If *A.* and *B.* co-parceners of an advowson do not agree to present

on a vacancy, *A.* the eldest, or her assigns, may present to the first turn, and *B.* or her assigns to the next. *Barker v. The Bishop of London, H.* 26 G. 2. C. 1. 659

2. And if, when *A.* and *B.* do not agree, *C.* (a stranger) implead *A.* only by quare impedit on a vacancy and recover, it is a bar to a quare impedit brought by *A.* against *C.* for *that* turn, though not for the next turn. *ib.*

PROCESS.

See INFERIOR COURT. •

PROCHEIN AMY.

See ATTACHMENT, No. 1.

PROFERT.

1. A party who claims under a deed &c. in the hands of a third person, to the possession of which he has no right, need not make a profert of that deed in pleading. *Stone v. Rawlinson, E.* 18 G. 2. C. B. 560
- And *Tuley v. Foxall.* 689
2. Therefore the indorsee of the administrator of the payee of a promissory note need not make a profert of the letters of administration in his declaration, in an action on the note against the maker. 560

PROHIBITION,

See COURT, No. 5, 6.

PROMISORY NOTE,

See DEFEAZANCE, No. 3.

1. A promissory note payable to *A.* or order after the death of *H.* is assignable under the stat. 3 & 4 An. c. 9.; and consequently the indorsee may maintain an action upon it

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the maker. *Coleham v. Cooke, H.*
16 G. 2. C. B. 393

2. But when the fund out of which payment is to be made is uncertain, or it is uncertain whether or not the time fixed for payment will come, in either of those cases the promisory note is not within the statute. *ib.* 397

3. See instances [n. d.] *ib.* 399

4. Three days' grace are allowed on promisory notes as well as on bills of exchange. [Cases referred to, n. a.] *ib.* 395

5. The executor or administrator of the payee of a promisory note may assign it over to a third person, who may sue on it in his own name: *Stone v. Rawlinson, E. 18 G. 2. C. B.* 559

PROTESTANT,

See PAPIST.

Q

QUAKER,

See AFFIRMATION.

QUARE IMPEDIT,

See PRESENTATION.

- A quare impedit may be brought for a church and an hospital. *The Mayor &c. of Bedford v. The Bishop of Lincoln, H. 19 G. 2. C. B.* 608

QUE WARRANTO INFORMATION,

See PLEADING, No. 90.

R

REASONABLE TIME,

See PLEADING, No. 56.

RECOGNIZANCE,

See PLEADING, No. 13.

RECOVERY.

1. If tenant in tail of lands *by purchase* under a settlement made by an ancestor ex parte maternâ, with the reversion in fee *by descent* ex parte maternâ, suffer a common recovery to the use of himself and his heirs, the lands will descend to his heirs ex parte paternâ. *Martin d. Tregonwell v. Strachan*; in error. *Dom. Proc. E. 17 G. 2.* 444
2. It would have been otherwise, if he had had both estates by descent from his mother. *ib.* 448
3. Origin of common recoveries stated. *ib.* 452
4. The court will amend a recovery whenever it can be done consistently with the rules of law. *Wynne v. Thomas, E. 18 G. 2. C. B.* 563
5. But they cannot amend the teste of a writ of entry, where it is not the misprision of the clerk and where there is nothing to amend by *ib.*
6. The common vouchee cannot appear by attorney before the day of the return of the writ of summons. *ib.*
7. If the vouchee die before the return of the writ of summons, the recovery is erroneous. *ib.*

C c c

REMAIN-

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REMAINDER.

1. Limitation to *A.* for 99 years, if he so long live, "and from and after the death of *A.* or other sooner determination of the estate limited to *A.* for 99 years, then to trustees during the life of *A.* to preserve contingent remainders, and after the end or other sooner determination of the said term, then to the first son of the body of *A.* in tail "male," with divers remainders over. *A.*, together with his son *B.*, levied a fine, and suffered a recovery, and both died: held that the limitation to *B.* was a good limitation; that the limitation to the trustees was a vested remainder; that the freehold was in them at the time of levying the fine; consequently that the fine did not make a good tenant to the præcipe, and that the recovery did not bar either the remainder to *B.* or the subsequent remainders. *Parkhurst v. Smith*, lessee of *Dormer*; in error. *H.* 15 G. 2. Dom. Proc. 327
2. Contingent remainders defined. *ib.* 337

RENT-CHARGE,

See CONDITION, No. 1. PLEADING, No. 72.

REPLEVIN,

- See COSTS, No. 9. PLEADING, No. 79, 80, 81, 82.
1. A replevin is a personal action, though the title to land be brought in question. *Eaton v. Southby*, *H.* 12 G. 2. C. B. 134

2. An action of replevin to recover damages is an action within the meaning of the stat. 24 G. 2. c. 44., which requires a plaintiff to demand a copy of the warrant of a justice, under which an officer (defendant) acted, before he brings his action. *Pearson v. Roberts*, *E.* 28 G. 2. C. B. 668
3. The court will not grant an attachment against a sheriff for not taking a replevin-bond on his granting the replevin. *Twell v. Colville*, *M.* 16 G. 2. C. B. 375
4. But an action will lie against him for not taking a replevin-bond. *ib.*
5. So, for taking insufficient pledges. [Cases referred to, *n. b.*] *ib.*
6. In that action the party can only recover to the amount of double the value of the goods distrained. *ib.*
7. It not appearing in a declaration by the assignee of a replevin-bond that the plaintiff was the avowant or person making cognizance; the court of themselves referred to the replevin suit, it being of record in this court, and the declaration concluding prout patet per recordum. *Barker v. Horton*, *E.* 17 G. 2. C. B. 460
8. Goods taken under a distress, for a penalty on a conviction under an act of parliament, cannot be replevied; *semb.* *Pearson v. Roberts*, *E.* 28 G. 2. C. B. 672

RESIGNATION,

See BOND, No. 2.

RETAINER,

See EXECUTOR, No. 4, 5.

RIGHT

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RIGHT OF WAY,

See WAY.

S

SET-OFF.

1. Where an executor sues in his own name for money due to the testator in his lifetime but received by the defendant afterwards, the defendant cannot set off a debt due to him from the testator. *Shipman v. Thompson*, T. 11 & 12 G. 2. C. B. 106
2. But a debt due to the defendant as surviving partner may be set off against a demand on him in his own right *ib. note.*
3. So a debt due from the plaintiff as surviving partner to the defendant may be set off against a debt due from the defendant to the plaintiff in his own right. *ib. note.*
4. Under the stat. 8 G. 2. c. 24. no debt on bond can be set off, unless it be on a bond for securing the payment of money. *Hutchinson v. Sturges*, T. 14 & 15 G. 2. C. B. 261
5. Consequently a bail-bond cannot be set off under that act. *ib.* 263
6. Nor can such a bond (given to an officer of the palace-court) be set off under the stat. 2 G. 2. c. 22. to an action brought against that officer. *ib.*
7. But a bail-bond assigned over to the party may be set off to an action brought by that party; *semb. ib.* 264

SHERIFF,

See ATTACHMENT. No. 4, 5. REPLEVIN, No. 3, 4, 5, 6.

SLANDER,

See COSTS, No. 10. EVIDENCE, No. 1, 2, 3.

1. The court will not arrest the judgment in an action for words in one court, though some of them be not actionable. *Lloyd v. Morris*, E. 17 G. 2. C. B. 443
2. *Aliter*, where there are two counts, none of the words in one are actionable, and a general verdict for the plaintiff. *ib.*

STATUTES.

1. If the words of the enacting part of a statute be doubtful, they may be explained by the title or preamble. *Coleban v. Cooke*, H. 16 G. 2. C. B. 395
2. But the plain words of an enacting clause are not to be restrained by the title or preamble. *ib.*
3. The stat. 7 & 8 W. 3. c. 7., giving an action for a false return of members of parliament, is a remedial act. *Myddelton v. Wynn*, Bart. in error, H. 19 Geo. 2. Cam. Scac. 599

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TOLL.

1. A prescription to take toll for passing on an ancient navigable river through the plaintiff's manor is bad in law. *The mayor &c. of Nottingham v. Lambert, T. 11 & 12 G. 2. C. B.* 111
2. A prescription for toll thorough cannot be supported, unless a consideration for it be shewn. *ib.*
3. Aliter of a toll traverse; there a consideration is implied. *ib.*

TRADE,

See BYE-LAW, No. 1, 2, 3, 4.

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TRIAL.

1. It is no objection after verdict that an action of covenant for not repairing &c. was brought and tried in

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in a foreign county, that defect being cured by the statute 16 & 17 Car. 2. c. 8. *The bailiffs &c. of Litchfield v. Slater*, M. 17 G. 2. C. B. 431

TROVER,

See DETINUE.

1. Trover for "old iron," without saying what quantity. good after verdict. *Talbot v. Spear*, E. 11 G. 2. C. B. 70

V

VENIRE FACIAS.

1. The venire facias (in an action on flat. 7 & 8 W. 3. c. 7., which gives an action for a false return of members of parliament) may be de corpore comitatus, that being a remedial act. *Myddelton v. Wynn*, 1 art. in error, H. 19 G. 2. Cam. Scac. 599
2. And since, by stat. 24 G. 2. c. 18 f. 3. the venire may be de corpore comitatus in all actions or informations on penal statutes. *ib. n.*

VENUE,

See PRACTICE, No. 4, 5.

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See JUROR.

VERDICT, Special.

1. A negative need not be found in a special verdict, except where it is necessary to shew that a person or thing does not come within a particular exception. *The Mayor &c. of Nottingham v. Lambert*, M. 12 G. 2. C. B. 117

VICAR,

See DILAPIDATIONS.

VIEW.

1. A tenant in a real action may pray a view either before or after the demandant has counted. *Druv. Lees*, T. 16 G. 2. C. B. 344
2. A view, being a dilatory, is only to be granted in cases where it is necessary. *ib.* 347
3. And consequently it will not be granted where it appears that the tenant knows what lands are demanded. *ib.*
4. Nor where the tenant is in possession of no other lands in the vill than the demandant sues for. *ib.*
5. And in a quarter plea (to a prayer of view) it is not sufficient for the demandant to say that the tenant is in actual possession of the lands demanded; he must add "and of 'no other lands in the same vill.'" *ib.* 348
6. But the tenant is entitled to a view when he is in possession of more lands in the vill than those demanded. *ib.* 347

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1. A conveyance to uses is to be construed like a common law conveyance. *Tapner d. Peckham v. Mierlot*, T. 12 & 13 G. 2. C. B. 180

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WARRANT,

See REPLEVIN, No. 2.

1. A warrant of distress granted by two justices under stat. 9 G. 2. c. 23. or

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23. on a conviction for selling spirituous liquors without a license need not be *under the seals* of the justices : it is sufficient if it be *under their hands*. *Padfield v. Cabell*, Tr. 16 & 17 G. 2. C. B. 411
2. A warrant only signifies an *authority* : it does not *ex vi termini* imply an instrument under seal. *ib.* 412

WARRANT OF ATTORNEY,

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WAY.

1. A general way and a private way by prescription are inconsistent, and cannot be claimed together. *Chichester v. Lettbridge*, E. 11 G. 2. C. B. 72
2. Prescription for a right of way for *A. and others* (not naming them) is uncertain, and bad even after verdict. *ib.*
3. There may be a way of necessity. *ib.*
4. An action will not lie by an individual for an obstruction in a public highway unless he sustain a particular damage : but if the plaintiff state that the defendant obstructed &c. by a ditch and gate across the road, by which the plaintiff was obliged to go a longer and a more difficult way, and that the defendant opposed him in attempting to remove the nuisance, this is a sufficient damage to support the action. *ib.* 73.
5. *A.*, the owner of a close situate within a close belonging to *B.*, had a prescriptive right of way through *B.*'s to his own ; 24 years ago *B.* stopped up the old way, and made a new way which was used ever since until lately when *B.* stopped it up ; in an action brought by *B.* against *A.* for going over the new way, it was holden that *A.* could not justify using the way as a way of necessity, but that he should

either have gone the old way and thrown down the inclosure, or brought an action against *B.* for stopping up the old way. *Reynolds v. Edwards*, M. 15 G. 2. C. B. 284

WILL.

1. The attestation of a will need not state that the witnesses subscribed their names in the presence of the testator. *Brice v. Smith*, E. 10 G. 2. C. B.

WITNESS.

1. A person who gives a bribe to another to vote at an election for members of parliament is a competent witness to prove the bribery in an action for the penalty under the stat. 2 G. 2. c. 24. *Mead v. Robinson* M. 17 G. 2. C. B. 422
2. On a prosecution for penalties under the stat. 9 An. c. 14. s. 5. the loser of the money at cards is a good witness to prove the loss. [Case referred to in n. c.] *ib.* 425
3. So, on a prosecution for the penalty under 23 G. 2. c. 13. s. 1. for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, though entitled to half the penalty. [n. c.] *ib.*
4. All persons who believe a future state are competent witnesses in this country. *Omicund v. Barker*, H. 18 G. 2. Chanc. 549
5. A person convicted of petit larceny not then a competent witness ; nor a credible witness to attest a will under the statute of frauds. *Pendock v. Mackinder*, H. 28 G. 2. G. B. 665
6. But now by stat. 31 G. 3. c. 35. he is a competent witness. *ib.* 668 n.

WRIT.

1. A *capias* returnable on a common return day, instead of a day certain, is only voidable, not void. *Karver v. James*, T. 14 & 15 G. 2. C.

J U D G E S
OF THE
COURT OF COMMON PLEAS
DURING THE TIME OF THESE REPORTS

EASTER, 10 GEO. II. 1737.



WILLES, Lord Chief Justice.

DENTON,
COMYNS,
J. FORTESCUE ALAND. } Justices.

On the 7th of July 1738, 12 Geo. 2., Mr. Baron (*William*) *Fortescue* was appointed to a seat on the Bench in this Court in the room of Mr. Justice *Comyns*, who was appointed Lord Chief Baron of the Court of Exchequer.

In the vacation after *Hilary* Term 1739, 40, Mr. Justice *Denton* died, and Mr. Baron *Parker* succeeded him in this Court.

In *Michaelmas* Term 1741 Mr. Serjt. *Burnett* was appointed a Judge of this Court instead of Mr. Justice *William Fortescue*, who was made Master of the Rolls.

In *Michaelmas* Term 1742 Mr. Justice *Parker* was appointed Lord Chief Baron of the Court of Exchequer, and Mr. Baron *Abney* came into this Court.

In *Trinity* Term 1746 Mr. Serjt. *Birch* was appointed a Judge of this Court in the room of Mr. Justice *J. Fortescue Aland*.

In *Easter* Term 1750 Mr. Justice *Abney* died, and he was succeeded here by Mr. Serjt. *Gundry*.

In *Hilary* vacation 1754 *H. Bathurst* Esq. one of his Majesty's counsel was appointed a Judge of this Court in the room of Mr. Justice *Gundry*.

In *Hilary* vacation 1757 Mr. Justice *Birch* died; and in the following Term *W. Noel* Esq., one of his Majesty's counsel, succeeded him in this Court.





